

No. 10312

United States
Circuit Court of Appeals
For the Ninth Circuit.

Vol 1
2320

MACCO CONSTRUCTION COMPANY,
a corporation,

Appellant,

vs.

A. L. FARR, R. P. SINCLAIR and YOUNG &
SON CO., LTD., a corporation,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

DEC 15 1942

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

MESSRS. SCHELL & DELAMER

215 West Seventh Street

Los Angeles, California

Attorneys for Defendants and Appellants,

PHILLIP BARNETT, Esq.,

111 Sutter Street

San Francisco, California

Attorney for Plaintiffs and Appellees.

In the Superior Court of the State of California
in and for the City and County of San
Francisco.

No. 300833

A. L. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a cor-
poration, BEN F. WELLS, JOHN DOE,
RICHARD ROE, BLACK AND WHITE
COMPANY,

Defendants.

COMPLAINT FOR DAMAGES

(Breach of Contract)

Now come the plaintiffs above named and for
cause of action against defendants, and each of
them, allege the following facts:

I.

That defendants John Doe, Richard Roe and
Black and White Company are sued herein under
fictitious names as their true names are presently
unknown to plaintiffs who pray leave of Court to
insert the same herein upon ascertainment, to-
gether with proper charging allegations.

II.

That defendant Macco Construction Company, at
all times herein mentioned, was and now is a cor-

poration organized [1*] and existing pursuant to the laws of the State of California.

III.

That on or about the 3rd day of December, 1940, defendants and plaintiffs entered into an oral agreement in the City and County of San Francisco, State of California, wherein and whereby plaintiffs agreed to furnish four (4) automobile trucks and the personal services of plaintiffs in the operation of the same, and defendants agreed to hire the exclusive personal services of said plaintiffs and said truck equipment for the entire duration of that certain grading and excavating project of defendants situated in the said City and County of San Francisco; that relying upon said oral agreement and pursuant thereto, plaintiffs did purchase said number of automobile trucks and defendants did hire the personal services of plaintiffs and the use of said equipment for a period commencing on the 3rd day of December, 1940.

IV.

That on or about the 18th day of January, 1941, the defendants, without cause, discharged the plaintiffs and refused to allow said plaintiffs with said equipment to continue performance on said project as aforesaid agreed; that plaintiffs have performed all covenants, promises and conditions on their part to be performed under said oral agree-

*Page numbering appearing at foot of page of original certified Transcript of Record.

ment; that plaintiffs at all times herein mentioned were willing and able to continue performance of all the promises, conditions and covenants on their part to be performed under said oral agreement.

V.

That under and pursuant to said oral agreement the defendants agreed to pay unto plaintiffs as and for compensation for said services and the use of said equipment, the sum of \$2.70 per hour per truck and in addition thereto the sum of \$1.30 on account of the payment of the salary of the driver of each [2] truck; that the period contracted for as aforesaid was and is approximately four months; that the difference between the cost of operation of said trucks and the contract price was approximately in the sum of Sixteen hundred (\$1,600) Dollars per month; that by reason of the said breach of contract by defendants these plaintiffs have been damaged in the total sum of Six Thousand Four Hundred (\$6,400.00) Dollars.

VI.

That plaintiffs relying upon said oral agreement, and with the knowledge of defendants, did expend the sum of Three Hundred (\$300.00) Dollars for licenses, permits and miscellaneous expenditures all in advance, to enable plaintiffs to furnish their services and equipment to defendants for the period contracted for as aforesaid.

Wherefore, plaintiffs pray judgment against defendants and each of them for damages in the total

sum of Six Thousand Seven Hundred (\$6,700.00) Dollars in accordance with the foregoing allegations, for their costs of suit incurred herein, and for such other, further and different relief as to the Court may seem just in the premises.

PHILLIP BARNETT

Attorney for Plaintiff. [3]

State of California,

City and County of San Francisco—ss.

A. L. Farr, being duly sworn, deposes and says:

That he is one of the plaintiffs in the above entitled action; that he has read the foregoing complaint for damages and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information or belief; and as to those matters that he believes it to be true; that he makes this verification on behalf of R. P. Sinclair and himself.

A. L. FARR

Subscribed and sworn to before me this 28th day of February, 1941.

[Seal]

VIOLET NEUENBURG

Notary Public, in and for the City and County of
San Francisco, State of California.

[Endorsed]: Filed Mar. 3, 1941 (Superior Court). [4]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO
FEDERAL COURT

To the Honorable the Superior Court of the State
of California in and for the City and County
of San Francisco:

The petition of Macco Construction Company, a
corporation, one of the defendants above named,
respectively shows as follows:

I.

That said petitioning defendant is a corporation
organized and existing under and by virtue of the
laws of the State of Nevada, and having its prin-
cipal place of business in the City of Carson City,
County of Ormsby, State of Nevada, and that said
petitioning defendant was at the time of the com-
mencement of this action, and ever since has been
and still is, a resident of and citizen of said State
of Nevada.

II.

That said cause is a civil action, to-wit: an ac-
tion for damages for an alleged breach of con-
tract of employment and for use [5] of equipment
in connection with a certain grading and excavat-
ing project of said petitioning defendant situated
in the said City and County of San Francisco,
known and referred to as the Bethlehem Steel Cor-
poration contract, and that at all times mentioned
in plaintiffs' complaint herein said petitioning de-

fendant was the sole and only person, firm or corporation in charge of the work being done under and pursuant to said Bethlehem Steel Corporation contract, said petitioning defendant being the contractor, and the only contractor, with respect to said Bethlehem Steel Corporation contract.

III.

That the controversy involved in this action is solely between citizens of the United States residing in and citizens of different states of the United States, to-wit: between plaintiffs A. L. Farr and R. P. Sinclair, who, said petitioner is informed and believes and therefore alleges, are citizens of the State of California, and the petitioning defendant, which is a citizen of the State of Nevada.

IV.

That the matter in dispute in this action exceeds in value the sum of Three Thousand Dollars (\$3,000.00), exclusive of costs, as appears from the allegations in the first amended complaint filed in said action, which allegations are incorporated herein by reference with the same force and effect as if fully realleged and restated herein for the purpose of showing the amount of the matter in dispute herein.

V.

That your petitioning defendant desires to remove said action before the trial thereof into the next District Court of the United States of

America, to be held in the Northern District of California, Southern Division.

VI.

That said petitioning defendant herewith presents a good [6] and sufficient bond, as provided by the statutes in such cases, that said petitioning defendant will enter into such District Court of the United States within thirty (30) days from the filing of this petition a certified copy of the record in this suit, and conditioned for the payment of all costs which may be awarded in this action by the said court, if the said District Court holds that said action was wrongfully or improperly removed thereto.

VII.

That this petitioning defendant has not to date been served with summons or complaint in this action and that, therefore, its time to appear herein and plead to said complaint has not expired as of the date of the filing of this petition, and that no other pleading to said complaint has heretofore been filed herein by your petitioner.

VIII.

That in said complaint it is alleged that on or about the 3rd day of December, 1940, defendants (including Macco Construction Company, a corporation, your petitioner herein, Ben F. Wells, John Doe, Richard Roe and Black & White Company) and plaintiffs entered into an oral agree-

ment in the City and County of San Francisco, State of California, wherein and whereby plaintiffs agreed to furnish four (4) automobile trucks and the personal services of plaintiffs in the operation of the same, and defendants agreed to hire the exclusive personal services of said plaintiffs and said truck equipment for the entire duration of that certain grading and excavating project of defendants situated in the said City and County of San Francisco; that said petitioning defendant is informed and believes and upon such information and belief alleges that, in referring to "that certain grading and excavating project of defendants situated in the said City and County of San Francisco", said complaint refers to said Bethlehem Steel Corporation contract; that said petitioning defendant is informed and believes and upon such [7] information and belief alleges that it is not true that the defendants mentioned in said complaint, or any of them other than said Macco Construction Company, a corporation, the petitioner herein, entered into any agreement whereby said plaintiffs, or either of them, or any of their equipment, were or was employed to do any work whatsoever for any of said defendants other than said petitioning defendant; and that it is not true that said defendant Ben F. Wells at any time mentioned in said complaint was personally engaged in any construction work or had any interest in the work so being carried on by said petitioning de-

fendant or in the employment or in any contract, if any such there was, between said plaintiffs and said petitioning defendant, save and except that said defendant Ben F. Wells was at all times mentioned in said complaint an employee of said petitioning defendant and with respect to said plaintiffs acted solely in the course and scope of said employment; that attached hereto, marked Exhibit "A" and incorporated herein by reference as fully as if herein set forth at length, is an affidavit of said Ben F. Wells.

IX.

That said petitioner is informed and believes and on such information and belief alleges that each and every defendant named in said complaint other than your petitioner is not a necessary or a proper party to this action and has no interest in the subject matter of this action, and has been fraudulently joined as a defendant in this action for the purpose of attempting to prevent a removal of this action to said United States District Court.

Wherefore, said petitioning defendant prays that said Superior Court proceed no further herein except to make an order of removal of said cause as required by law from said Superior Court to said United States District Court, and to accept and approve the said statutory bond in connection therewith which is herewith present- [8] ed to said Superior Court, and to direct a transcript of the record herein to be made and certified by the Clerk

of said Superior Court as provided by law, and your petitioner will ever pray.

MACCO CONSTRUCTION
COMPANY,

By E. J. DAVIS

SCHELL & DELAMER,

By W. O. SCHELL

Attorneys for Petitioning
Defendant. [9]

State of California,
County of Los Angeles—ss.

E. J. Davis, being by me first duly sworn, deposes and says: that he is an officer, to-wit: Vice-President of Macco Constructing Company, a corporation, the petitioning defendant in the above entitled matter, and that affiant makes this verification for and on behalf of said corporation; that he has read the foregoing Petition for Removal to Federal Court and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes the same to be true.

E. J. DAVIS

Subscribed and sworn to before me this 12th day of May, 1941.

[Seal]

MILDRED HUFFINE

Notary Public in and for the said County and State.

[Endorsed]: Filed May 15, 1941 (Superior Court). [10]

[Title of Superior Court and Cause.]

EXHIBIT A

State of California,

City and County of San Francisco—ss.

AFFIDAVIT OF BEN F. WELLS IN SUP-
PORT OF PETITION FOR REMOVAL

Ben F. Wells, being first duly sworn, deposes and says:

That he is one of the defendants in the above entitled action, and was served with a copy of the summons and complaint therein on or about the 18th day of March, 1941; that he has caused his answer to be served and filed herein.

That at all times mentioned in the complaint herein affiant has been an employee of the defendant Macco Construction Company, a corporation, and was employed as the superintendent of that project in the City and County of San Francisco, State of California, known as the Bethlehem Steel Corporation contract; that affiant did not at any time mentioned in said complaint employ the plaintiffs above named, or either of them, or any of their equipment, to do any work whatsoever for affiant, and affiant denies that he was at such [11] time personally engaged in any construction work whatsoever. Furthermore, affiant alleges that he did not have any interest whatsoever in the grading and excavating project referred to in said complaint, which project, affiant is informed and believes and upon such information and belief alleges, is the same one which is hereinabove referred

to as the Bethlehem Steel Corporation contract, and affiant had no interest in the work being carried on in connection with said project or in the employment of or in any contract between said plaintiffs and said defendant Macco Construction Company, save and except in so far as affiant was such employee of said defendant Macco Construction Company, and affiant denies that he is indebted to said plaintiffs, or either of them, in the sum of \$6,700.00, or in any other sum, or at all.

That at the time your affiant discussed the matter of renting trucks from the plaintiffs, your affiant informed the plaintiffs that he was the Superintendent for Macco Construction Company, and that Macco Construction Company was the contractor on the work.

BEN F. WELLS

Subscribed and sworn to before me this 13 day of May, 1941.

[Seal]

RUTH NATUSCH

Notary Public in and for the County of San Francisco, State of California.

[Endorsed]: Filed May 15, 1941 (Superior Court). [12]

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men By These Presents, That Macco Construction Company, a corporation, as Principal, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing

under and by virtue of the laws of the State of Maryland, and authorized to transact business under the laws of the State of California, as Surety, are held and firmly bound unto A. L. Farr and R. P. Sinclair, Plaintiffs in the above entitled action, their successors or assigns, in the sum of Five hundred and no/100 (\$500.00) Dollars, lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our successors and assigns, as the case may be, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such, that

Whereas, Macco Construction Company, a corporation, one of the Defendants in the above entitled action, has applied, or is about to apply, by petition to the Superior Court of the State of California, in and for the City and County of San Francisco, for the removal of a certain cause therein pending wherein A. L. Farr and R. P. Sinclair are the Plaintiffs, and the Macco Construction Company, a corporation, Ben F. Wells, John Doe, Richard Roe, and Black and White Company, are the Defendants, to the District Court of the United States for the Northern District of California, Southern Division, for further proceedings on the ground in said petition set forth, and that all further proceedings in said action be stayed.

Now, Therefore, if the above named Macco Construction Company, a [13] corporation, Defendant,

shall within thirty (30) days from and after the date of the filing of said petition enter in said District Court of the United States for the Northern District of California, Southern Division, a duly certified copy of the record in the above entitled action, and shall pay, or cause to be paid, all costs that may be awarded therein by the said District Court of the United States, if such Court shall hold that such suit was wrongfully and improperly removed thereto, then this obligation to be void, otherwise to remain in full force and effect.

Dated this 12th day of May, 1941.

MACCO CONSTRUCTION
COMPANY

By E. J. DAVIS

Vice President

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND

By W. M. WALKER

Attorney in Fact

Attest:

THERESA FITZGIBBONS

Agent

State of California,
County of Los Angeles—ss.

On this 12th day of May, A.D., 1941, before me, Mildred Huffine, a Notary Public in and for said County and State, personally appeared E. J. Davis, known to me to be the Vice President of the Macco Construction Company, the Corporation that executed the within Instrument, known to me to be

the persons who executed the within Instrument, on behalf of the Corporation herein named, and acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] MILDRED HUFFINE

Notary Public in and for said County and State.

State of California,
County of Los Angeles—ss.

On this 12th day of May, 1941, before me, S. M. Smith, a Notary Public, in and for the said County of Los Angeles, State of California, residing therein, duly commissioned and sworn, peronally appeared W. M. Walker, known to me to be the Attorney-in-Fact, and Theresa Fitzgibbons, known to me to be the Agent of the Fidelity and Deposit Company of Maryland, the Corporation that executed the within instrument, and acknowledged to me that they subscribed the name of the Fidelity and Deposit Company of Maryland thereto and their own names as Attorney-in-Fact and Agent, respectively.

S. M. SMITH

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Feb. 18, 1942.

[Endorsed]: Filed May 15, 1941 (Superior Court). [14]

[Title of Superior Court and Cause.]

NOTICE OF FILING PETITION FOR AND
OF MOTION FOR ORDER OF REMOVAL

To the Plaintiffs Above Named and to Phillip Barnett, Esq., their attorney:

You and Each of You Will Please Take Notice that Macco Construction Company, a corporation, one of the defendants in the above entitled action, will forthwith after the time of service of this notice, move the above entitled Court in the Department of the Presiding Judge thereof, located in the City and County of San Francisco, State of California, for an order of said Court removing said action to the District Court of the United States for the Northern District of California, Southern Division, in accordance with the petition and bond therefor, which is herewith served upon you and which will herewith be filed in said court by said defendant.

Dated at Los Angeles, California, this 13 day of May, 1941.

SCHELL & DELAMER

By W. O. SCHELL

Attorneys for said Defendant

[Endorsed]: Filed May 15, 1941 (Superior Court). [15]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

The petition and bond for removal of the defendant, Macco Construction Company, a corporation, being duly presented to this court, and it appearing to the court that said petition for removal of said action to the District Court of the United States of America for the Northern District of California, Southern Division, has been duly filed and is in due form of law, and that said bond has been duly filed with good and sufficient sureties, as provided by law, and it appearing to the court that this is a proper cause for removal to said District Court, said petition and bond are hereby accepted and approved, and

It Is Hereby Ordered and Adjudged that this cause be and it is hereby removed to said United States District Court for the Northern District of California, Southern Division, and that the Clerk is hereby directed to make up and certify the record in said cause for transmission to said District Court forthwith.

Dated: May 15th, 1941.

FRANK T. DEASY

Judge.

Receipt of copy admitted this 15th day of May, 1941.

PHILLIP BARNETT

Attorney for Plaintiff.

[Endorsed]: Filed May 15, 1941 (Superior Court). [16]

In the United States District Court in and for the
Northern District of California, Southern Division.

No. 21896 S

A. L. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation,
BEN F. WELLS, JOHN DOE, RICHARD ROE,
BLACK AND WHITE COMPANY,

Defendants.

NOTICE OF FILING RECORD

To the Plaintiffs Above Named and to Phillip Barnett, Esq., Attorney for Plaintiffs:

You and each of you will please take notice that on the 13th day of June, 1941, the certified record from the Superior Court of the State of California, in and for the City and County of San Francisco, was transferred and filed in the United States District Court, in and for the Northern District of California, Southern Division.

Dated: June 13th, 1941.

SCHELL & DELAMER,

Attorneys for Defendants.

[Endorsed]: Filed Jun. 25, 1941. [17]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, MACCO CON-
STRUCTION COMPANY, A CORPORA-
TION

Comes now the defendant Macco Construction Company, a corporation, and answering plaintiffs' complaint, for itself alone and not for any of its co-defendants, admits, alleges and denies as follows:

I.

Alleges that it has not sufficient information or belief to enable it to answer the allegations of paragraph I of plaintiffs' complaint, and therefore, for the want of such information or belief, denies generally and specifically each and every allegation therein contained.

II.

Denies that this defendant at any time mentioned in plaintiffs' complaint was, or now is, a corporation organized or existing pursuant to the laws of the State of California, but on the contrary alleges that this answering defendant at all said times was, and now is, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and is a resident of said State of Nevada.

III.

Answering paragraph III of plaintiffs' complaint, admits that on or about the 3rd day of December, 1940, this defendant and [18] the plaintiffs entered into an oral agreement in the City and

County of San Francisco, State of California, wherein and whereby the plaintiffs agreed to furnish four automobile trucks and the personal services of plaintiffs in the operation of the same, and that this defendant agreed to hire the personal services of the plaintiffs and said truck equipment, but denies that said agreement was for the hiring of said trucks or any truck, or said or any personal services, for the entire duration of that certain or any grading or excavating or other project of this answering defendant, or of any of the defendants, situated in the said City and County of San Francisco, or elsewhere or at all. On the contrary, this answering defendant alleges that said agreement was that the plaintiffs would furnish and maintain said four automobile trucks in good, safe, serviceable and workable condition, and the personal services of the plaintiffs in the operation thereof, for such time as this answering defendant should desire to avail itself thereof in connection with said grading and excavating project of this defendant in said City and County of San Francisco, and for no other or longer purpose or period of time.

Denies that relying upon the oral agreement alleged in plaintiffs' complaint, or pursuant thereto, or relying upon any agreement with this defendant, except as herein specifically alleged, the plaintiffs, or either of them, did purchase said number of automobile trucks, or any automobile truck, or that this answering defendant, or any of the defendants, did hire the use of said equipment, or any of it, or

the personal or any services of the plaintiffs, or either of them, for a period commencing on the 3rd day of December, 1940, or for any other period at all.

Alleges that, except as herein expressly admitted or denied, it has not sufficient information or belief to enable it to answer the allegations of said paragraph III and, therefore, for want of such information or belief, denies each and all of the remaining allegations thereof. [19]

IV.

Admits that on or about the 18th day of January, 1941, this answering defendant ceased to desire to avail itself of the use of said truck equipment, or any of it, or the services of the plaintiffs, or either of them, and thereupon terminated said agreement hereinbefore set forth.

Except as herein specifically admitted, denies generally and specifically each and every allegation of paragraph IV of plaintiffs' complaint.

V.

Admits that under and pursuant to the agreement hereinabove set forth this answering defendant agreed to pay to plaintiffs as and for compensation for their services and for the use of said truck equipment the sum of Two Dollars and Seventy Cents (\$2.70) per hour per truck, while said truck was in a condition to be operated and was being operated for the benefit of this defendant, and in addition thereto the sum of \$1.42851 per

hour on account of the payment of salary of the driver of each of said trucks for time during which said driver was on duty in connection with the business of this defendant, said sums, however, to be subject to deductions therefrom on account of amounts paid or expenses incurred by this defendant on account of personal liability and property damage insurance, workmen's compensation insurance, Federal Old age social security, gasoline and oil furnished by this defendant, the time of mechanics and cost of parts necessary for repairs to said trucks incurred by this defendant on behalf of plaintiffs, time during which the drivers of said trucks were not actually engaged in the business of performing services of this defendant due to the condition of said trucks, and other items of cost and expense reasonably incurred by this defendant on behalf of plaintiffs in connection with the operation of said truck equipment.

Alleges that the total number of working days upon said [20] project was fifty-five and one-sixth ($55 \frac{1}{6}$) days, and no more, and that said trucks were operated for a total of seventeen (17) of such days, and no more, and that the plaintiffs or either of them did not render any personal services to this defendant under said agreement. Alleges that the services of said trucks and of the plaintiffs would not have been required on all of said remaining working days.

Except as herein specifically admitted or alleged, denies generally and specifically each and every allegation contained in paragraph V of plaintiffs' com-

plaint, or that the period contracted for between the plaintiffs and this defendant was or is approximately five (5) months, or any other period except as herein alleged, or that the difference between the cost of operation of the trucks referred to in plaintiffs' complaint and the contract price agreed upon between this defendant and the plaintiffs was approximately the sum of Sixteen Hundred Dollars (\$1,600.00), or any other sum, per month, or that by reason of any breach of contract by this defendant, or the or any termination of said agreement by this defendant, or for any other reason connected with said agreement or the work or services to be performed or rendered thereunder, or the cessation by the plaintiffs or either of them of performing said work or rendering said services on said 18th day of January, 1941, or at any other time or at all, the plaintiffs, or either of them, have been damaged in the sum of Six Thousand Four Hundred Dollars (\$6,400.00), or any other sum or at all.

VI.

Alleges that it has not sufficient information or belief to enable it to answer the allegations of paragraph VI of plaintiffs' complaint, and therefore, for the want of such information or belief, denies generally and specifically each and every allegation therein contained. [21]

As a Second, Separate and Distinct Defense to Plaintiffs' Complaint, This Answering Defendant Alleges:

I.

This answering defendant hereby refers to, adopts and incorporates herein as fully as if herein set forth at length all the admissions, allegations and denials hereinbefore in this answer contained.

II.

Alleges that the automobile trucks and each of them furnished by the plaintiffs to this defendant were not in good or serviceable or workable condition, and that the plaintiffs did not maintain said trucks in good, safe, serviceable or workable condition, and that prior to the 18th day of January, 1941, certain of the drivers of said trucks refused to operate the same because of the condition of said trucks, and that plaintiffs and each of them did not render or offer to render to this defendant any personal services under said agreement, and that by reason of said matters and of each of them the plaintiffs and each of them themselves breached the said contract between the plaintiffs and this defendant prior to said 18th day of January, 1941, and that said breach of said contract by the plaintiffs continued to and including the said 18th day of January, 1941.

As a Third, Separate and Distinct Defense to Plaintiffs' Complaint, This Answering Defendant Alleges:

I.

This answering defendant hereby refers to, adopts and incorporates herein as fully as if herein set

forth at length all the admissions, allegations and denials contained in its first defense to plaintiffs' complaint.

II.

Alleges that the automobile trucks and each of them furnished by the plaintiffs to this defendant were not in good, safe serv- [22] iceable or workable condition, and that the plaintiffs did not maintain said trucks in good, safe serviceable or workable condition, and that prior to the 18th day of January, 1941, certain of the drivers of said trucks refused to operate the same because of the condition of said trucks, and that the plaintiffs and each of them did not render or offer to render to this defendant any personal services under said agreement, and that by reason of said matters and each of them the consideration to this defendant for the entering into by it of said agreement with the plaintiffs failed in a material part.

As a Fourth, Separate and Distinct Defense to Plaintiffs' Complaint This Answering Defendant Alleges:

I.

That the complaint nor any part nor paragraph thereof does not state facts sufficient to state a cause of action or to state a claim upon which relief can be granted against this answering defendant.

As a Fifth, Separate and Distinct Defense to Plaintiffs' Complaint, This Answering Defendant Alleges:

I.

That it is informed and believes, and upon such information and belief alleges, that prior to the institution of this action the plaintiffs and each of them have assigned and transferred to Young & Sons Co., Ltd., a corporation, all of their right, title and interest in and to any recovery to which the plaintiffs or either of them might be entitled against this answering defendant by reason of any matters set forth in plaintiffs' complaint, and that said Young & Sons Co., Ltd., a corporation, at the time of the commencement of this action and at all times thereafter was and is the owner of all such right, title and interest of the plaintiffs and of each of them, and that the plaintiffs or either of them have not the legal capacity to maintain this action. [23]

Wherefore, this answering defendant prays for judgment against the plaintiffs and each of them that said plaintiffs and each of them take nothing by reason of their complaint, but that this answering defendant recover against the plaintiffs and each of them its costs of suit incurred herein, and for such other, further and different relief as to the Court may seem just in the premises.

SCHELL & DELAMER,

By GERALD F. H. DELAMER,

Attorneys for defendant
Macco Construction Com-
pany, a corporation.

United States of America,
Southern District of California,
Central Division—ss.

Fred H. Brown, being by me first duly sworn, deposes and says: that he is the Secretary-treasurer of Macco Construction Company, a corporation, answering defendant in the above entitled action; that he has read the foregoing Answer of defendant Macco Construction Company, a Corporation, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

That affiant makes this verification for and on behalf of said defendant corporation.

FRED H. BROWN.

Subscribed and sworn to before me this 14th day of June, 1942.

[Seal]

FLORENCE P. NELSON,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires May 20, 1942.

(Receipt of Service.)

[Endorsed]: Filed June 17, 1941. [24]

[Title of District Court and Cause.]

NOTICE OF DEMAND FOR TRIAL BY JURY

To the Defendant, Macco Construction Company,
and to Schell & Delamer, Its Attorneys:

Please Take Notice That the plaintiff above-named hereby demands a trial by jury of all of the issues presented by the pleadings in the above case.

PHILLIP BARNETT,
Attorney for Plaintiffs.

Dated: June 16th, 1941.

[Endorsed]: Filed June 19, 1941. [25]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants Macco Construction Company and Ben F. Wells, and move the Court for an order of dismissal of the above entitled action on the following grounds:

1. That the evidence fails to establish that a valid contract or any contract was entered into by and between the plaintiffs and said defendants or either of them.

2. That the evidence affirmatively shows that the plaintiffs had no capacity to contract or engage in the business of transportation of property for hire.

3. That the evidence fails to show that said defendants or either of them wrongfully breached any contract.

4. That the evidence fails to establish that plaintiffs [26] sustained any damages.

Respectfully submitted,

SCHELL & DELAMER.

By W. O. SCHELL,

Attorneys for Defendants,
Macco Construction Com-
pany and Ben F. Wells.

MEMORANDUM OF AUTHORITIES

City Carriers Act—Act 5134 Deering's General Laws.

Entremount vs. Whitsel 13 Cal. 2d, Page 290.

Georgia Truck System, Inc. vs. Interstate Commerce Commission, Circuit Court of Appeals, Fifth Circuit, 123 Fed. 2d, page 210.

Industrial Development & Land Company vs. Goldsmith 56 Cal. App. 507. Duntley vs. Tutt 48 A.C.A. 414.

[Endorsed]: Filed Mar. 6, 1942. [27]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Friday, the 6th day of March, in the year of our Lord, one thousand nine hundred and forty-two.

Present: the Honorable James Alger Fee, District Judge.

No. 21896-S—Civil

[Title of Cause.]

The parties hereto and the jury impaneled herein being present as heretofore, the trial hereof was thereupon resumed. Robert Sinclair and Frank Young were recalled and testified on behalf of the plaintiffs. Mr. Barnett introduced in evidence and filed plaintiffs' exhibits Nos. 4 and 5, and plaintiffs rested. Mr. Schell made a motion to dismiss, which said motion was Ordered denied. J. R. Gerhart, Fred Crawford, Louis Meinn, Oscar Carlson, John Keenan, Arthur Birch, and O. H. Tucker were each sworn and testified on behalf of the defendants. Mr. Schell introduced in evidence and filed defendants' exhibit "A". Mr. Schell read in evidence the deposition of Ben F. Wells, and the defendants rested. Robert Sinclair was recalled and testified on behalf of the plaintiffs, and both sides rested. It Is Ordered that the further trial hereof be continued to March 7, 1942, at 10:00 A. M., and the jury, after being duly admonished by the Court, was excused until that time. [28]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Thursday, March 5, 1942.

Counsel Appearing:

For the Plaintiffs:

Phillip Barnett, Esq.

For the Defendants:

W. O. Schell, Esq.

For the Intervenor:

J. W. O'Neill, Esq.

(A jury was duly impaneled and sworn and opening statements made by respective counsel.)

Mr. Barnett: Your Honor, I would like to read into evidence the deposition of A. F. McLane, who is the district engineer in charge of the Bethlehem Steel Company, and the man who had charge of this particular work on behalf of the Bethlehem Steel Company. This deposition, your Honor, was taken on Friday, September 12, 1941, and there were present Mr. Schell, representing the defendant, and myself representing the plain- [31] tiffs.

DEPOSITION OF A. F. McLANE

“Direct Examination

“Mr. Barnett: Q. Mr. McLane, will you state your business, please?

(Deposition of A. F. McLane.)

“A. I am known as District Engineer of the Bethlehem Steel Company.

“Q. Where do you reside at the present time?

“A. 2709 Dwight Way, Berkeley.

“Q. In the course of your business, Mr. McLane, are you sent to different parts of the country? A. Yes.

“Q. And do you expect to be in San Francisco within the next two or three months?

“A. No.

“Q. Directing your attention to December of last year, were you in the yard of the Bethlehem Shipbuilding Company?

“A. Yes.

“Q. That is here in San Francisco?

“A. Yes.

“Q. Did you have anything to do with the contract, the contemplated contract for the removal of the approximately 600 thousand cubic yards of dirt from the Bethlehem yard, or property adjacent thereto?

“A. Yes.

“Q. And in what connection were you identified with that?

“A. In an advisory capacity during the taking of bids for the removal of the hill.

“Q. And where was the hill located?

“A. It was located along the westerly side of the so-called Risdon property.

(Deposition of A. F. McLane.)

“Q. You said you had something to do with the bids. Could you state approximately how much dirt was to be removed?

“A. Yes, we conditionally agreed that it was 615 thousand cubic yards.

“Q. Was there any condition in reference to the time within which that was to be removed?” [32]

Mr. Schell: Just a moment. To which we at this time wish to object as incompetent, irrelevant and immaterial, and it has no bearing on the issues here and not the best evidence. If there was a written contract that would be the best evidence.

The Court: Let me see the answer.

Mr. Barnett: It is line 20.

The Court: Well, looking at the deposition, do you see any reason why those answers should not go in now?

Mr. Schell: I don't think the entire deposition is material so far as that is concerned, in this particular litigation.

The Court: Well, it is simply, as I understand, preliminary to an attempt to develop one feature of the case.

Mr. Schell: Well, I will withdraw the objection, your Honor.

The Court: That issue, I take it, you would stipulate, anyhow.

Mr. Schell: Yes.

(Deposition of A. F. McLane.)

Mr. Barnett: (Reading) "Q. Can you give us any information on that subject, Mr. McLane?

"A. I can tell you the stipulated date for completion.

"Q. Would you do that?

"A. Which was April 8; that was stipulated in the contract.

"Q. When was the work to start?

"A. I can't answer that definitely, although I can tell you when it did start.

"Q. Would you do so, please?

"A. (Referring to a diary).

"Q. You are now referring to a——

"A. Diary.

"Q. That is your own diary, is it?

"A. That is my diary, yes. I have an entry of November 30—'Macco started [33] work'; and then on December 9—'Macco really started with one shovel,' and by that I think I mean that some of the boys were on the job on November 30, doing preliminary studying of the project.

"Q. At that time had a contract been let to the Macco people?

"A. They had no written contract then.

"Q. Can you state how it came about that they were on the ground at that time?

"A. As I recall it, we had a verbal contract, pending the actual writing of one, and asked them to start work.

(Deposition of A. F. McLane.)

“Q. Subsequently, a written contract was entered into, is that right? A. Yes.

“Q. But at that time, in November, that these men were there, it was agreed and understood by Macco, we well”—that is an error, your Honor, but I will read it as it appears. “—we well as yourself, that they had the contract? A. Yes.

“Q. Now, you stated that the work was completed on April the 16th?

“A. Yes. I have an entry in my diary, and you are welcome to introduce that letter which I gave you, which is correspondence between myself and Lieutenant Elliott, stating that the last work was done on April 16.”

The Court: Well, that is stricken. That is certainly hearsay.

Mr. Barnett: There is no objection to that, your Honor. Page 5, line 5:

“Q. Will you state how many working days were given to the Macco people to complete this job?”

Mr. Schell: That is objected to as immaterial.

The Court: Objection sustained.

Mr. Barnett: (Reading) “Mr. Barnett:

Q. The question [34] now is, how many working days were given?”

Mr. Schell: Same objection.

The Court: Same ruling.

Mr. Barnett: May it be stipulated, then, in the spirit of time, your Honor, that contract No. R-100, which is the contract referred to and consisting of a lot of small printed matter has in paragraph Second of its provisions the following provision, and I offer this as an offer of proof——

Mr. Schell: May I approach, your Honor. I loaned you our copy of the contract, and I haven't seen it since.

Mr. Barnett: Well, I haven't got your contract, but I have a typewritten copy of the contract. I see it is attached to the deposition, your Honor. There is a copy of it, and I am now referring to the date at which the work was to start and the date upon which it was to be completed.

The Court: Well, I don't see any purpose in reading the provision if counsel can agree as to the date when it was supposed to be completed and the date when it was completed and the working time. If counsel wishes to stipulate——

Mr. Schell: Well, I am perfectly willing to stipulate the actual work started on December 9th, and was finished——

Mr. Barnett: Well, that is not the point. His Honor suggested that the time of performance as shown by the contract, that is what *we interested* in, the date so far as the contract is concerned, because there seems to be some difficulty as to the interpretation of the time when it started.

The Court: Ladies and gentlemen, I think we

will save time if I let you go at the present time. I will give you a recess now until 2 o'clock this afternoon. During the time you are absent from the Court you will observe the instructions [35] the Court has already given you, and will not discuss the matter among yourselves or with other persons, or remain in the presence of other persons who may be discussing this case. You may now retire, ladies and gentlemen, and return here at 2 o'clock.

(The jury then retired, and after further discussion between the Court and respective counsel a recess was taken until 2 o'clock of the same day.) [36]

Thursday, March 5th, 1942, 2 o'clock P. M.

The Court: You may proceed.

Mr. Barnett: Your Honor, we have entered into a stipulation to the effect that the remainder of the deposition of A. F. McLane will not be read, but it may be stipulated that under the contract by which this work was to be performed, the work was, according to the contract, to start on November 16th, and be completed on or before April 8th; and, as a matter of fact, work was completed on April 16th.

We offer in evidence at this time, your Honor, the contract, R-100, as plaintiffs' first exhibit.

Mr. Schell: Just a moment. We are taking the stipulation. First, we will accept the stipulation,

but I don't quite see the materiality of the contract, cluttering up the record.

The Court: I think that this is sufficient, unless there is some purpose to it. I don't see that there is. I think the stipulation covers it. The objection is sustained.

Mr. Barnett: We make the offer for the purpose of the record, your Honor.

Mr. O'Neill, please.

J. W. O'NEILL,

Called for the Plaintiffs; Sworn.

The Clerk: Will you state your name to the Court and jury? A. J. W. O'Neill.

Mr. Barnett: Q. What is your address, Mr. O'Neill?

A. 1101 Central Bank Building, Oakland.

Q. Mr. O'Neill, what is your business or profession, please? A. I am an attorney. [37]

Q. How long have you been practicing your profession? A. 27 years.

Q. Where are your offices located?

A. Oakland, California.

Q. Am I correct in stating that you are the attorney for Young & Sons?

A. That is correct.

Q. What is their business, please?

A. Well, I presume you would call them construction contractors.

Q. Do they deal in automobile trucks?

(Testimony of J. W. O'Neill.)

A. Not as dealers, no.

Q. Well, what I am getting at, in November of 1940, am I correct in saying that they had for sale these four trucks subsequently purchased by Farr & Sinclair?

A. That is correct.

Q. At that time, Mr. O'Neill, were you their attorney?

A. I was.

Q. Did you have anything to do with the preparation of the contract for the sale of these trucks to Farr and Sinclair?

A. Yes, I prepared the contract.

Q. Did you on or about that date, or sometime close thereto, have a conversation with anyone connected with the Macco Construction Company?

A. I did.

Q. With whom did you have that conversation?

A. Mr. Wells.

Q. Would you state to the Court and jury, please, the circumstances leading up to that conversation?

A. If your Honor please, I assume that I am to leave out hearsay conversations?

The Court: I should suggest so, yes, sir.

A. It may be a little difficult to state the circumstances without bringing in some possible hearsay. I might state it this way, that the matter first came to my attention when Mr. Young, president of Young & Sons Company, and Mr. Farr and Mr. Sinclair came to my office to discuss the terms of a proposed contract. [38] Those terms were pre-

(Testimony of J. W. O'Neill.)

pared—the contract was prepared by me. There was also prepared a letter to be signed by Farr and Sinclair, and addressed to Macco Construction Company. That letter was signed by Farr and Sinclair, and the letter together with, I believe, two copies of the proposed contract of purchase and sale of the trucks were delivered to Farr and Sinclair. At the end of the contracts was typed a form of guaranty, which supposedly was to be signed by Macco Construction Company, and a day or two later there was another meeting with Mr. Young and Mr. Sinclair and Mr. Farr——

Mr. Barnett: Q. May I interrupt there. Have you in your possession a contract on the form of guaranty that you just referred to?

A. I do not have in my possession the form of the original contract that I referred to.

Q. Have you a copy of it?

A. I have no copy of it.

Q. I show you what purports to be a copy of a conditional sales contract, which, I believe, you furnished my office with, and I ask you whether or not you recognize that?

The Court: Just a moment. Stay right where you are, counsel.

Mr. Barnett: Pardon me.

Q. Do you recognize that as a copy of the contract you just referred to?

A. This is not the copy of the contract that was first drawn up, Mr. Barnett.

(Testimony of J. W. O'Neill.)

Q. What is the instrument that has been handed to you?

A. The instrument that has been handed to me is a copy of the second or final contract.

Q. I see.

A. I might state, however, that the only difference between the two contracts, the original draft and the second draft was as to the purchase price and as to the amount [39] of the monthly payments.

Q. Well, then, am I correct in saying, Mr. O'Neill, that we may discount the first contract as being in the stage of negotiation as to the ultimate price agreed upon, is that correct?

A. I don't just get the meaning of your question. I will say this, the first contract was not entered into.

Q. Yes. A. That was discarded.

Q. Now, I hand you here a copy of what purports to be a type of guaranty, and I ask you if you recognize that copy? A. I do.

Q. Of those two documents you have in your hand now, the first one is the contract that was ultimately signed, and the second is the guaranty that you mentioned a moment ago?

A. Yes. Now, this document you refer to as the guaranty is a copy of the guaranty that was typed at the end of the first agreement, the one that was to be taken over by Farr and Sinclair to the Macco Construction Company.

(Testimony of J. W. O'Neill.)

Mr. Barnett: Your Honor, we offer as Plaintiffs' Exhibit No. 1 the contract that counsel has, and second, as the next exhibit in order, the guaranty referred to.

Mr. Schell: We object to that. I don't see the materiality of it.

Mr. Barnett: It is preliminary, your Honor.

Mr. Schell: It is not binding on the Macco Construction Company. There was no showing they even saw the contracts.

Mr. Barnett: I take it there is no objection to the contract itself, that is, the purchase of the equipment, is that correct, counsel?

The Court: Its objection is presently sustained. I don't know whether there is any connection with the defendant with [40] these contracts at all.

Mr. Barnett: It is preliminary.

The Court: It may be, but I sustained the objection.

Mr. Barnett: Well, I will offer the contract as plaintiff's exhibit for identification next in order.

The Court: I won't prevent you from having it marked, that is true.

Mr. Barnett: Yes, your Honor, and the form of guaranty I offer as plaintiffs' next exhibit for identification.

(Conditional sale contract marked "Plaintiffs' Exhibit No. 1 for identification;" and form of guaranty marked "Plaintiffs' Exhibit No. 2 for identification.")

(Testimony of J. W. O'Neill.)

Mr. Barnett: Q. Would you continue from there, Mr. O'Neill, with particular reference to any conversation that you might have had with Mr. Wells or any agent of the Macco Construction Company?

Mr. Schell: Now, just a minute. I object to that question, to the form of the question, because that would call for the conclusion and opinion of the witness as to who might be an agent of the Macco Construction Company.

The Court: Well, tell whom you had the conversation with. That is the first thing.

A. I will state this. The only person connected with the Macco Construction Company with whom I have had any conversation was Mr. Ben F. Wells, who designated himself the general superintendent.

Mr. Barnett: Q. Go ahead from that.

A. That conversation was over the telephone. I can't give you the exact date, but it was between the 1st and the 4th of December of 1940. The conversation which I had with Mr. Wells was substantially [41] as follows: I told Mr. Wells that negotiations were being completed between Farr and Sinclair for the purchase by them under a conditional sale contract from my client, Young & Sons Company of four auto trucks, and that Farr and Sinclair wished to get those trucks under a conditional sale contract with no money being paid down. I said that "Farr and Sinclair have advised me that you refused to guarantee the pay-

(Testimony of J. W. O'Neill.)

ments, or to sign the guaranty which I prepared.” He said, “Yes, we would not guarantee anything under those contracts.” I said, “Well, the thing that Mr. Young wants to find out for sure is whether or not you would be willing to accept an assignment by Farr and Sinclair of the moneys that would become due them from Macco Construction Company, up to the sum of \$875.00 a month.” I advised him that the contract, the proposed contract, would call for payments of \$3500.00, payable \$875.00 per month for four months.” “Well,” he say, “we would be willing to accept an assignment, but we will not guarantee anything, and I want it distinctly understood that we will only oblige ourselves to pay to your client under the assignment any moneys that may become due to Farr and Sinclair.” I told him, “Well, that was all they wanted him to assure us that he would do.” And I said, “Another thing, Mr. Young wants to know for sure that you have arranged a contract with Farr and Sinclair for using those trucks on the hauling job at the Bethlehem plant.” He says, “Yes, and we have had those arrangements made.”

Q. Subsequently——

A. (Continuing) So I then prepared, following that conversation, and assignment, a form of acceptance of the assignment. I have the original of that here. That is one of the originals.

Q. Would you produce it, please?

A. It is attached to an [42] original of the conditional sale contract itself.

(Testimony of J. W. O'Neill.)

Mr. Barnett: We offer, your Honor, in evidence the assignment and copy of the conditional sale contract as plaintiffs' next exhibit. I desire to read the assignment to the jury at this time. (Reading)

“Assignment.

“For a Valuable Consideration, the receipt whereof is hereby acknowledged, we do hereby assign, transfer and set over unto Young & Sons Co., Ltd., a corporation, 599 Colusa Avenue, Berkeley, California, \$7,500.00 of the first moneys to become due and payable to us from Macco Construction Company under our contract with said Macco Construction Company upon the hauling job at the Bethlehem Steel Corporation property, said sum of \$7,500.00 to be paid in installments of at least \$875.00 per month on or before the 4th day of each month, commencing January 4, 1941, and we do hereby authorize and request said Macco Construction Company to pay said moneys to said Young & Son Co., Ltd., a corporation, and acknowledge and agree that such payments, when so made, shall operate as a full acquittance to said Macco Construction Company of its said obligations to us to the extent of the payments made in accordance with this assignment.

“In Witness Whereof we have hereunto set our hands this 3rd day of December, 1940.

A. L. FARR

R. P. SINCLAIR

(Testimony of J. W. O'Neill.)

“We Hereby Accept the foregoing assignment and agree to make the payments at the times and in the amounts specified in said assignment. It Is Distinctly Understood and Agreed, however, that we are obligated to make said payments only out of [43] moneys to become due and payable from us to said A. L. Farr and Robert P. Sinclair, and not otherwise, and that if sufficient moneys do not become due and payable to said A. L. Farr and Robert P. Sinclair to make said payments, we shall be obligated to make payments only to the extent of the moneys actually due and payable from us to said A. L. Farr and Robert P. Sinclair.

“In Witness Whereof the undersigned has caused these presents to be executed by its officer thereunto duly authorized.

“MACCO CONSTRUCTION
COMPANY

“By BEN F. WELLS,
General Superintendent,”

I think that stands for.

May I have the assignment and conditional sale contract marked as plaintiffs' exhibit next in order?

The Court: Yes, they are admitted in evidence.

(Assignment and conditional sale contract marked “Plaintiffs' Exhibit No. 3.”)

Mr. Barnett: Q. Do you know of your own knowledge whether *or Young & Son* have received any money under that assignment?

(Testimony of J. W. O'Neill.)

A. I don't know. There is none received as far as I know. I can only put it that way.

Mr. Barnett: That is all.

Cross Examination

Mr. Schell: Q. Mr. O'Neill, in your conversation with Mr. Wells over the telephone he told you that he wanted it distinctly understood that they were not guaranteeing any of the payments, and that the only obligation that they would be willing to undertake would be to honor an assignment as to such moneys that were determined? [44]

A. That is correct.

Q. You prepared that acceptance of the assignment, did you not? A. I did.

Q. That is why you put that wording in there?

A. That is correct.

Q. In your conversation with Mr. Wells there was no mention of any specific time at which these people would work, was there?

A. I can't recall any specific time being mentioned, Mr. Schell. The only thing that I can recall discussing on that subject was that Mr. Wells verified to me the fact that they had made a contract with Farr and Sinclair, and that those trucks, if sold to them, would be used on that job; but I don't recall any specific time being mentioned.

Q. In other words, so far as the conversation with Mr. Wells was concerned, you wouldn't know whether it was a day, or two days, or a month, or a year that was mentioned?

(Testimony of J. W. O'Neill.)

A. I can't recall any discussion of a definite time.

Mr. Schell: That is all.

Redirect Examination

Mr. Barnett: Q. Mr. O'Neill, was anything said as to the payments of \$875.00 for a period of four months, which payments were to be made on the 1st day of each and every month, commencing in January?

A. Oh, yes, that part was discussed; in fact, I state to Mr. Wells, I believe, as I testified before, that Mr. Young wouldn't want to let these trucks go out without a down payment, unless he felt sure that he was going to get the \$875.00 for the four months specified in the contract.

Mr. Barnett: That is all. [45]

Mr. Schell: That is all.

Mr. Barnett: Mr. Young, please.

FRANK YOUNG,

Called for the Plaintiffs; sworn.

The Clerk: Will you state your name to the Court and jury. A. Frank Young.

Mr. Barnett: Q. Mr. Young, you are identified with the firm of Young & Sons, is that correct?

A. Yes.

Q. You were the owner of these trucks we are concerned with? A. Yes, sir.

(Testimony of Frank Young.)

Q. Do you recall on what day they were delivered to Mr. Farr and Mr. Sinclair, approximately?

A. Well, it was probably along about the 25th of November, or something like that—yes, about November, 1940.

Mr. Schell: I beg your pardon? Did you say the 25th? A. Of November, yes.

Mr. Barnett: Q. Has your firm, or have you yourself, as far as you know of, received any payment on account of the assignment referred to?

A. We haven't received any payments.

Mr. Barnett: That's all.

The Court: Just a moment.

Mr. Schell: That's all.

Mr. Barnett: Mr. Farr, please.

A. L. FARR

Called for the Plaintiffs; sworn.

The Clerk: Will you state your name to the Court and jury. A. A. L. Farr. [46]

Mr. Barnett: Q. Mr. Farr, in November of 1940, what was your business?

A. I wasn't doing anything at the time.

Q. Are you one of the plaintiffs here?

A. Yes, sir.

Q. Do you recall the circumstances under which you went to work on the Bethlehem Steel job?

A. Yes, sir.

(Testimony of A. L. Farr.)

Q. Would you state to the Court and to the jury, please, when you first heard about that job?

Mr. Schell: I don't see the materiality of that, and I object to the question on that ground.

Mr. Barnett: It is preliminary.

The Court: Yes, he may answer.

A. I just heard of it by an individual by the name of Mr. Strand. We contacted the Bethlehem Company, a Mr. Dalston and he informed us that Macco had the contract for it, and that Mr. Wells from Macco Construction Company was not there at the time. We contacted him at the Palace Hotel. He said he was very busy that day, but he would be glad to see us the next day in regard to hiring any equipment for the Bethlehem Steel Company job.

Mr. Barnett: Q. Did you see him the next day?

A. Yes, I saw him the next evening.

Q. Where did you see him and who was present?

A. I saw him at the Palace Hotel—Mr. Sinclair, myself and Mr. Wells.

Q. You were referring to the equipment?

A. Yes, we did.

Q. Will you state to his Honor and to the jury the substance of that conversation, as you remember it?

A. Mr. *Well* asked what make, type and so forth the equipment was. We explained they were four Autocar trucks that we had in mind purchasing for the job. They were seven yard capacity, and

(Testimony of A. L. Farr.)

would handle eight yards; that they were in good condition, [47] had Heil hoists, and that is about all I remember.

Q. Did you discuss the terms under which you were to let them have these trucks?

A. Yes, sir.

Q. What were the terms, please?

A. Railroad Commission rates.

Mr. Schell: We object to the form of that question as calling for the conclusion of the witness.

The Court: State what was said.

A. Railroad Commission rates, \$2.70 an hour.

Q. Who said that? A. Mr. Wells.

Mr. Barnett: Q. Was anything said by Mr. Wells with reference to payment of drivers, insurance and so forth?

A. Yes, sir, he said that his firm would take care of the drivers' payroll as well as the insurance; that is, the compensation insurance.

Q. Directing your attention to the language of the contract, at the time you were going to work will you state what the conversation was in that regard, please?

A. He said——. We asked him how long the job would last, and he said four months, 120 working days.

Q. Was anything further said in reference to your employment by the Macco people?

A. Nothing other than he said the equipment sounded interesting, and we would be welcome to

(Testimony of A. L. Farr.)

go to work for them on another job after the Bethlehem Steel job was over.

Q. When do you recall that this conversation took place? A. The last part of November.

Q. Subsequent to that time did you have any further conversation with Mr. Wells?

A. Yes, several days after.

Q. What did the conversation deal with? [48]

A. He said he was not definitely sure how many trucks he would hire, because he didn't know as to his own equipment, whether it would be in San Francisco or San Diego. He said to contact him three or four days later.

Q. Was this prior to the time that he signed Plaintiffs' Exhibit 3, the assignment?

A. Yes, sir.

Q. Subsequently, after these various conversations, you produced Plaintiffs' Exhibit 3 for his signature, is that correct? A. Yes, sir.

Q. And did he return it? A. Yes, sir.

Q. Did he return the amounts, that is, the \$875.00 a month? A. Yes, sir.

Q. For a period of four months?

A. Yes, sir.

Q. And it was signed subsequently by him, is that correct? A. Yes, sir.

Q. Did you subsequently return that to Mr. Young or to Mr. O'Neill?

A. Mr. O'Neill it was.

Q. How long have you been in the trucking business? A. I was raised in it.

(Testimony of A. L. Farr.)

Q. How old a man are you, plesae? A. 31.

Q. Was your father in it before you?

A. Yes, sir.

Q. Do you specialize in any particular branch of the trucking business?

A. The last several years it has been mostly construction.

Q. In the last several years you say it has been mostly construction work? A. Yes.

Q. In reference to the trucks themselves, are you familiar with the maintenance of and the various quality of trucks? A. Yes, sir.

Q. Do you work on them?

A. Yes, sir. [49]

Q. Are you a mechanic? A. Not by trade.

Q. You know something about trucks, don't you? A. Yes, sir.

Q. Can you operate them? A. Yes, sir.

Q. Can you state to his Honor and to the jury the condition of the trucks that you purchased?

A. I didn't hear that.

Q. What condition were the trucks in?

A. They were in good condition.

Q. Did you drive over to the Bethlehem job?

A. Yes, sir.

Q. When did they actually go to work?

A. December 9th.

Q. When did you receive delivery, if you recall?

A. About December 5th, approximately. That may be a day or so off.

(Testimony of A. L. Farr.)

Q. Did you do any work on the trucks in between that time? A. Yes, I worked on them.

Q. What work, please?

A. It was mostly minor repairs, such as ignition, wiring, generators, gaskets, carburetion and other minor things like that.

Q. How many hours a day were those trucks on the job?

A. They were on all the time, 24 hours a day.

Q. For how long a period of time?

A. They were there from the first part of December until January 18th.

Q. During that time did you devote your services to the work? A. Yes, sir.

Q. How many hours a day did you put it?

A. At least 12, and sometimes 24.

Q. Were you there with Mr. Sinclair?

A. Yes, sir.

Q. There was always one of you there, is that right? A. That is correct.

Q. Have you received any money from the Macco Construction [50] Company for the work that you performed? A. No, sir.

Q. Have you received any money from the Macco Construction Company for the work that the trucks did? A. No.

Q. Nothing has been paid to you at all?

A. Nothing at all.

Q. When was the first time you were informed that your services were no longer required, and

(Testimony of A. L. Farr.)

when I say "services" I mean the services of the trucks as well? A. On January 18th.

Q. What were the circumstances, please?

A. Mr. Sinclair told me——

Q. Just a minute. You had no conversation with any representative of the Macco people, is that true? A. Not before then.

Q. Is it also true that Mr. Sinclair took care of the figures of the partnership?

A. All the figures?

Q. The mathematics connected with the books and so forth? A. Yes.

Q. Is it also true you devoted your time to the maintenance of the trucks themselves, is that correct? A. Yes, sir.

Mr. Barnett: That's all.

Cross Examination

Mr. Schell: Q. Mr. Farr, you say you have been in the trucking business how long?

A. Ever since I can remember.

Q. Not knowing how good your memory is, what would you say that was in years?

A. Well, my father started in long before I was born.

Q. I didn't ask you about your father. How long have you been in the trucking business?

A. Actually in business myself, starting at the legal age, say, 21. [51]

Q. What were you doing in connection with the trucking business during the year 1940?

(Testimony of A. L. Farr.)

A. I was driving for Mr. Sinclair.

Q. You were a driver in the employ of Mr. Sinclair? A. Yes, sir.

Q. Did that go right up until the first part of December, 1940?

A. No, Mr. Sinclair sold out. I drove for his partner whom he sold out to for a while after that.

Q. What had you been doing during the month of November, at that time?

A. We were negotiating this arrangement.

Q. During the month of November?

A. Yes, sir.

Q. Had you ever been in the trucking business yourself, that is, outside of a truck driver?

A. Yes, sir.

Q. When and where?

A. Fargo, North Dakota, from—I took over ownership on the death of my father on the 30th of June, 1932.

Q. When did these particular trucks first start working over there on the Bethlehem job?

A. The 9th of December.

Q. Did all your trucks work that day?

A. Yes, I believe they did.

Q. Isn't it a fact that those trucks were numbered 11, 22, 33 and 44? A. Yes, sir.

Q. As a matter of fact, No. 44 didn't work at all that day, did it?

A. I don't recall offhand.

Q. You say that you devoted from 12 to 24

(Testimony of A. L. Farr.)

hours a day in the operation of this trucking business, is that correct? A. Yes, sir.

Q. You weren't on the payroll of Macco, were you? A. No.

Q. You were engaged in your own business of operating this trucking business, is that right?

A. Yes, sir.

Q. Mr. Sinclair was not an employee of Macco, was he? A. No. [52]

Q. Was he engaged also in the operating of this trucking business? A. Yes.

Q. How much time did he spend around there?

A. About the same time.

Q. 12 to 24 hours a day? A. Yes, sir.

Q. What did you do during those 12 to 24 hours a day?

A. That covers a lot of territory. We were busy adjusting equipment, taking care of it, watching it, watching the drivers.

Q. Did the trucks work on the 10th of December, any of them? A. I don't know that.

Q. Did you keep any records of when these trucks operated, and when they didn't operate?

A. I didn't personally.

Q. Did Mr. Sinclair, as far as you know, keep records of that? A. Yes.

Q. Of the hours that the trucks operated, the individual trucks and so forth?

A. I believe he did, yes.

(Testimony of A. L. Farr.)

Q. So far as you know, that record is available in the firm of Farr and Sinclair, is that right?

A. As far as I know.

Q. Isn't it a fact, Mr. Farr, that on the 9th day of December, there were only three trucks—I am talking now about those four trucks, these Auto-cars—that were in operation. And further, none of them were able to work a full day that day?

A. No, that isn't right.

Q. Isn't it a fact that when the trucks were trying to operate that first day, that you had gas-kets blow out and water hoses go bad and ignition trouble?

A. We had some, yes.

Q. Isn't it a fact——. Well, withdraw that.

Q. Do you know Mr. Burch? A. Yes, sir.

Q. He was the foreman around that place, was he not? A. Yes, sir. [53]

Q. Macco? A. Yes, sir.

Q. Do you remember having a conversation with Mr. Burch on the 9th day of December, in which he told you that the trucks were in such terrible condition that he couldn't let you work?

A. Not that kind of a conversation.

Q. Did he say that to you in substance or effect at that time? A. I don't recall that.

Q. And isn't it a fact that you told him that you would do some work on the trucks, that the trucks had been standing around for several years, and everything had dried out, and you were going to do some work on them, and he said something to

(Testimony of A. L. Farr.)

the effect, "Well, you better, if you want to work around here"? A. No.

Q. Isn't it a fact that about two days later he told you your trucks were in such bad condition that you were all through on that job?

A. Mr. Burch didn't say that.

Q. Isn't it a fact that you then asked him if you fixed the trucks and got them back in good shape could you go back to work?

A. All that was with Mr. Wells.

Q. Mr. Wells told you——. You had that kind of a conversation with Mr. Wells, did you?

A. Not that kind of a conversation, no, sir.

Q. I am asking you if you had a conversation like that with Mr. Burch? A. No, sir.

Q. Isn't it a fact that when you asked him if you could go back on the job, put the trucks back to work, he said that he would have to see Mr. Wells about it? A. No, sir.

Q. December 9th, the day when the job started, was a Monday, was it not?

A. I don't recall.

Q. With the exception of whatever work those trucks did on that [54] date, no more work was done by those trucks until the following morning?

A. I don't remember.

Q. It was about the end of that first week when Mr. Burch said, "If your trucks are all in working condition, you can try again," or words to that effect? A. No.

(Testimony of A. L. Farr.)

Q. Did you keep a record of the percentage of time that your trucks were in operation?

A. Mrs. Sinclair kept those records.

Q. Did you have considerable brake trouble with those trucks? A. No, sir.

Q. Did you reline the brakes at any time?

A. Yes, sir.

Q. Did you do mechanical work on these trucks?

A. Some.

Q. And you supervised the drivers?

A. Yes, sir.

Q. Gave them instructions? A. No, sir.

Q. What did you do in the way of supervising? You said you were busy supervising and watching the drivers? What did you do in that regard?

A. Checking on them as to their capabilities.

Q. And if you found they weren't capable, what would you do? A. Fire them.

Q. You fired them. How many did you fire because they were not capable?

A. I don't recall the exact number.

Q. Approximately?

A. I couldn't give you that definitely.

Q. Was it more than one? A. Yes.

Q. More than five? A. No.

Q. Less than five?

A. Somewhere around five.

Q. Somewhere around five. How many drivers did you hire for that job?

A. It varied considerably, depending on the

(Testimony of A. L. Farr.)

number of trucks Macco would let us run during the shift.

Q. You furnished all the gasoline and everything for the operation of those trucks?

A. No, but it was deducted from [55] our earnings.

Q. Now, you had considerable trouble, didn't you, all during the time you were on this job and keeping those trucks operating? A. No, sir.

Q. Did those trucks have cabs on them?

A. Three of them did.

Q. What kind of cabs? A. Open.

Q. Open cabs. What do you mean by an open cab? A. Without doors.

Q. What? A. Without doors.

Q. Were they equipped with lights?

A. Yes, sir.

Q. What kind of lights?

A. I don't recall the name.

Q. Do you remember having a conversation with Mr. Tucker? Do you know Mr. Tucker?

A. Yes, I know Mr. Tucker.

Q. He was an employee of Macco's, wasn't he?

A. Yes, sir.

Q. Manager and assistant superintendent?

A. Yes, sir.

Q. You would see Mr. Tucker from time to time on the job, would you? A. Yes, sir.

Q. Do you remember an occasion approximately a week before January 18th, 1941, when you met

(Testimony of A. L. Farr.)

Mr. Tucker at the entrance to that little office they have there in the Bethlehem yards?

A. I don't recall meeting Mr. Tucker there, do you mean?

Q. What?

A. I don't recall definitely meeting him any particular place.

Q. Do you recall a conversation you had with Mr. Tucker when you met him in the office, say, around about the 10th or 11th or 12th of January, along in there, and you asked Mr. Tucker, "How much longer will I be around here?"

A. I don't recall that.

Q. Can you recall whether there was such a conversation or not? A. No, sir. [56]

Q. And Mr. Tucker said, "Not much longer"?

A. No.

Q. He said, "You better be looking for work for those trucks," and he told you about a job over across the Bay that Kaiser was handling?

A. No, sir.

Q. You don't remember that conversation?

A. No, sir.

Q. Do you remember of having a number of complaints from drivers that they wouldn't drive these trucks because they were unsafe?

A. No, sir.

Q. Do you remember any such complaints?

A. One.

Q. Do you remember who that was?

(Testimony of A. L. Farr.)

A. No, sir.

Q. What did you do with that driver?

A. I don't recall.

Q. Did you fire him or did he quit?

A. He complained that the brakes were bad on one. They were relined the same day.

Q. Did he continue working, or did he quit?

A. Not for us.

Q. He didn't continue driving those trucks?

A. No.

Q. Now, you furnished all the repair parts and so forth of these trucks, did you? A. Yes, sir.

Q. And maintained them during that time, from December 9th to January 18th? A. Yes, sir.

Q. Paid all the operation expense?

A. Yes, sir.

Mr. Schell: That is all.

Redirect Examination

Mr. Barnett: Q. Mr. Farr, who furnished these drivers for you? A. Macco.

Q. That was part of the deal that they insisted upon, is that true?

Mr. Schell: Just a moment. We object to that as leading and suggestive. [57]

The Court: Objection sustained.

Mr. Barnett: Q. Was there any conversation had with Mr. Wells relative to the furnishing of drivers by them for your equipment?

A. Yes, sir.

(Testimony of A. L. Farr.)

Q. What was that conversation?

A. He said that Macco had considerable drivers of their own on their hands, and said they didn't have any equipment, and asked us if we would absorb them.

The Court: Will you read the answer?

(Answer read.)

Mr. Barnett: That's all.

Mr. Schell: That's all.

Mr. Barnett: Mr. Thiel, please.

HERBERT THIEL,

called for the Plaintiffs; Sworn.

The Clerk: Will you state your name to the Court and jury. A. Herbert Thiel.

Mr. Barnett: Q. Mr. Thiel, what is your business or occupation, please? A. Mechanic.

Q. How long have you been a mechanic?

A. Approximately around 20 years.

Q. How old a man are you, please?

A. 46.

Q. Are you specializing in trucks, auto trucks?

A. I have; in the last number of years I have.

Q. Where are you presently working?

A. I am working for G. W. Thomas Drayage Company.

Q. Directing your attention to the latter part of November, 1940, or early part of December

(Testimony of Herbert Thiel.)

of that year, were you acquainted with Mr. Farr and Mr. Sinclair?

A. I was not, until I was sent down from the union. [58]

Q. In what capacity were you sent, as a mechanic? A. Yes, sir.

Q. Did you subsequently go to work for them?

A. Yes.

Q. Am I correct——

Mr. Schell: I beg your pardon.

Mr. Barnett: Q. Mr. Thiel, you worked for Farr and Sinclair while they were on this Macco job? A. Yes, sir.

Q. Are you familiar with the type of equipment they had operating at that time?

A. Yes, sir.

Q. Have you had experience in overhauling trucks of that character? A. Yes, I have.

Q. Have you operated them?

A. Yes, I have.

Q. And repaired them, I take it? A. Yes.

Q. Will you state to his Honor and to the jury, please, what the condition of the trucks was during the time you were working for them?

A. Well, I would say the trucks were in pretty good condition.

Q. On or about January 17th or 18th, what was the condition of the trucks?

A. They were in very good condition then.

Q. How many hours a day were they working?

(Testimony of Herbert Thiel.)

Mr. Schell: Just a moment. Withdraw that.

A. They were, as far as I know, working almost all the time, except when they were laid up for rain.

The Court: That answer is stricken out.

Mr. Barnett: Q. Approximately how many hours a day, assuming a day had 24 hours in it, could you tell us these trucks were working, if you know?

Mr. Schell: I object to that question as calling for the conclusion and opinion of the witness.

The Court: I don't know. If he doesn't know, he can say so. [59]

A. I was only working there 8 hours, of course; sometimes a little overtime; but as far as I know, during the time I was there they were working practically all the time, except when they might be laid up for small repair for a short time.

The Court: That answer is stricken out.

Mr. Barnett: Q. Who else did mechanical work on those trucks besides yourself?

A. There were two other mechanics on the other two shifts.

Q. By "the other two shifts," what do you mean?

A. In other words, they worked three shifts, and there was a mechanic for each shift.

Q. That is, each mechanic worked eight hours a day, is that correct? A. That's right.

(Testimony of Herbert Thiel.)

Q. Now, you did have some sloppy weather, as you call it? A. Yes.

Q. Is that true? A. Yes.

Q. Is it also true on occasions all of the trucks on the job had to be hauled out by caterpillar, is that correct? A. That's correct.

Q. These trucks were no exception?

A. No.

Q. You say they were in very good condition at the time that the work terminated?

A. That's right.

Q. What did you do after that work?

A. I went to work for Sibley.

Q. On the same job?

A. On the same job.

Q. What type of equipment did they have?

A. They have had different types, but practically on the same caliber of a truck that Mr. Farr and Mr. Sinclair had.

Q. When did you go to work for Farr and Sinclair first?

A. It was either the 3rd or 4th of December. [60]

Q. What did you do between that time and the time that the trucks actually worked on the job?

A. Worked on the trucks, done the minor repairs on there to have them in good condition when they went to work.

Mr. Barnett: That's all.

The Court: Just a moment, please.

(Testimony of Herbert Thiel.)

Cross Examination

Mr. Schell: Q. What kind of trucks did Sibley operate?

A. They have had Kleibers and—I don't know—different names. As I say, they had Kleiber trucks there.

Q. Any Autocars like this?

A. No, they didn't have no Autocars like this.

Q. Did you do any major overhauling on any of these trucks, these four Autocars?

A. Just a few.

Q. What did you do? Did you put any new transmissions in them?

A. Put in new rear ends.

Q. How many new rear ends did you put in?

A. Either one or two. One was torn when they hauled it out with the cat.

Q. Did you have any trouble clutch trouble?

A. Nothing excepting a little adjustment—that's all.

Q. Isn't it a fact, Mr. Thiel, every time they dropped the clutch it would hop off five or six feet?

A. Not to my knowledge.

Q. How about brakes on them?

A. They were all in pretty good condition, except the one that we had to reline.

Q. You just relined one set of brakes, is that correct?

A. Yes, sir.

Mr. Schell: That is all. [61]

(Testimony of Herbert Thiel.)

Redirect Examination

Mr. Barnett: Just one question, Mr. Thiel:

Q. You said you had to put in a rear end because one truck was pulled out by a cat.

A. Yes, sir.

Q. Tell us what you mean by that?

A. Well, where they dump, as it was raining very soft there, it sunk down clear to the bedding. They hooked the big cat on to it, and put the power on the truck to pull it out, to get it unloaded, and pulled the rear end out of it.

Q. By "cat" you mean caterpillar tractor?

A. Caterpillar tractor.

Q. That happened with other trucks belonging to other people——

A. Yes.

Mr. Schell: What do you mean?

The Court: Just a minute. Let counsel finish his question.

Mr. Barnett: Q. Is that correct?

A. Yes.

Q. They were pulled out by the Caterpillar?

A. Yes.

Mr. Barnett: That's all.

Recross Examination

Mr. Schell: Q. Those trucks retained their rear ends, though, didn't they?

A. I didn't get that.

Q. Those trucks retained their rear ends, though, didn't they?

(Testimony of Herbert Thiel.)

A. I don't know. Some of them have had rear ends. I know they were putting rear ends in other trucks there, too.

Mr. Schell: That's all.

Mr. Barnett: That's all. Mr. Sinclair, please.

ROBERT SINCLAIR,

called for the Plaintiffs; Sworn. [62]

The Clerk: Will you state your name to the Court and jury. A. Robert Sinclair.

Mr. Barnett: Your Honor, may I request that the bailiff bring over that blackboard. This witness is afflicted, as your Honor can observe, with a type of ailment that might make it difficult for him to answer questions. There is nothing the matter with his writing those answers on the blackboard, and with your Honor's permission I would like to examine the witness under those circumstances.

The Court: Have you any objection, counsel?

Mr. Schell: No, I have no objection.

The Court: All right, the Court will be very pleased to have the witness testify accordingly. Bring the blackboard over here so everybody can see it. I wonder if it would not be better to put it so both counsel face it.

Mr. Schell: I was going to suggest that we put it here and have the witness down here.

The Court: Yes, bring it a little closer.

Mr. Barnett: I don't know if the jury can see it there or not, your Honor.

(Testimony of Robert Sinclair.)

The Court: Straighten it out now, counsel. I think you better write fairly large, Mr. Sinclair. After you are through writing stand out of the way so everybody can see it.

Mr. Schell: Do you mind if I sit here?

The Court: No, if you can share the table with counsel without argument.

Mr. Barnett: We get along fine, your Honor.

The Court: I think, gentlemen, before starting this I will give the jury a recess. We will take a recess for a few moments, ladies and gentlemen of the jury. [63]

Mr. Barnett: I might mention that sometimes Mr. Sinclair can come right out with it, and other times he cannot, as your Honor observed.

The Court: Yes, anything to make Mr. Sinclair comfortable. The Court will be in recess.

(Recess.)

Mr. Barnett: May I recall Mr. Young to the stand for one question, please, your Honor?

The Court: All right.

FRANK YOUNG,

Recalled for the Plaintiffs; previously sworn.

Mr. Barnett: Q. Mr. Young, during the recess you called my attention to an inaccuracy you made in reference to a question that I asked.

A. Yes.

(Testimony of Frank Young.)

Q. That dealt with the date of delivery of those trucks. A. Yes, sir.

Q. And you asked me to place you on the stand for that purpose? A. Yes.

Q. Have you refreshed your recollection as to that date?

A. Yes, that date was about the 1st of December.

Q. What did you have in mind when you answered the 25th or 26th of November?

A. That was when we first started—they first started talking to me about buying the trucks.

Mr. Barnett: That's all.

Mr. Schell: No questions.

Mr. Barnett: Mr. Sinclair.

ROBERT SINCLAIR,

Recalled for the Plaintiffs; previously sworn.

Mr. Barnett: Q. Mr. Sinclair, what is your present busi- [64] ness or occupation?

A. (Writing on blackboard): Truck driver.

Q. Truck driver? A. Yes, sir.

Mr. Schell: I am awful sorry, Mr. Barnett, but I cannot read that.

The Court: Turn that around so all the jury can see it.

Mr. Barnett: Q. Have you been in the contracting business? A. Yes.

(Testimony of Robert Sinclair.)

Q. How long have you been in the contracting business? A. (Writing): 1939.

Q. Do you recall the latter part of November, 1940, when you had a conversation with Mr. Wells?

A. Yes, sir.

Q. Where was that conversation had?

A. (Writing): Palace Hotel.

Q. Palace Hotel? A. Yes.

Q. What were the circumstances of your coming in contact with Mr. Wells?

A. (Writing): Farr and I had heard of the Bethlehem job and contacted Mr. Wells to find out if he was interested in renting trucks.

The Court: Now, just stand back out of the way, Mr. Sinclair.

(Answer read aloud by Mr. Barnett.)

Mr. Barnett: Q. Do you recall what date you first contacted Mr. Wells at the Palace Hotel?

A. No, sir.

Q. Do you remember the occasion?

A. No.

Q. Do you remember seeing him the first time?

A. Yes.

Q. Was that in a room in the Palace Hotel?

A. Yes.

Q. Am I correct in saying that Mr. Wells, Mr. Farr and yourself were present? A. Yes.

Q. Will you state to the jury, please, and to his Honor, what you said and what Mr. Wells said in reference to renting your [65] trucks? State the conversation please.

(Testimony of Robert Sinclair.)

A. (Writing): Mr. Farr made most of the conversation. He asked Mr. Wells if he was interested in renting trucks, and Mr. Wells said he probably would be as soon as he learned whether or not Macco's trucks were going to San Diego or not. Farr explained that the trucks we had in mind were Autocars, cab over engine models, and had a capacity of almost seven cubic yards water level. Mr. Wells said he was interested and to contact him in a few days.

The Court: Stand out of the way, counsel, so the jury can all read that.

Mr. Barnett: Should I read the answer to the jury?

The Court: Can the jury all read it, or shall I have it read? Apparently the jury can read it.

Mr. Barnett: I believe there are two jurors here, if your Honor please, that cannot read it.

A Juror: We would like to have you read it.

The Court: All right. Read it to the jury.

(Answer read aloud to the jury by Mr. Barnett.)

Mr. Barnett: Q. Did you contact him in a few days? A. Yes.

Q. What conversation did you have on that occasion?

A. (Writing): At the Palace Hotel Mr. Wells again would not give a final answer.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Q. How long after this second conversation did he give you a final answer?

Mr. Schell: That is objected to as——

Mr. Barnett: Withdraw it.

Q. Did he give you a final answer?

A. Yes. [66]

Q. When was that, please?

A. (Writing): At his apartment. He told us we could consider ourselves hired.

(Answer read aloud by Mr. Barnett.)

Q. Was that after or before the time that he signed this assignment to Young & Sons?

A. Before.

Q. How long after this conversation in his apartment was it when he signed the assignment?

A. A few days.

Q. Was anything said at any of these conversations as to the length of time that you and your equipment would be used? A. Yes, sir.

Q. Will you state to his Honor and to the jury, please, what was said and by whom?

A. (Writing): Mr. Wells said the job would last four months. He also said that Macco had many jobs all over the Coast, and after this job we could follow them around. He said he was glad to help us get started. We explained that we were buying the trucks on the strength of this contract. We had a guaranty with us at that time, which he promised to sign. He would not sign it, however,

(Testimony of Robert Sinclair.)

for the amount stipulated. He said if we would have the amount changed from \$750.00 per month to \$500.00 per month he would sign it.

The Court: You may read it, counsel.

(Answer read aloud by Mr. Barnett.)

Mr. Barnett: Q. What was said about the Macco trucks working on the San Diego job?

A. (Writing): At that time he said Macco's trucks were going to be in San Diego, and that he was glad to get our trucks. He asked us if we knew anyone else who had any idle trucks.

(Answer read aloud by Mr. Barnett.)

Q. Was anything said relative to the payment of \$750.00, which he asked be reduced to \$500.00 at the time that the guaranty [67] was presented to him?

Mr. Schell: That is objected to as leading and suggestive.

A. (Writing): I don't understand it.

The Court: Objection sustained.

Mr. Barnett: Q. Did he sign a guaranty for \$500.00? Let me put it that way. A. No, sir.

Q. Did he sign any guaranty at all?

A. No, sir.

Q. Was anything said as to the reason why he changed his mind in that regard?

A. Yes, sir.

Q. State what was said, please.

A. (Writing): He had told us he was vice-president of Macco. When we took this guaranty to him the following day, changed to \$500.00, he told

(Testimony of Robert Sinclair.)

us he was not vice-president but general superintendent and did not have the authority to sign it.

(Answer read aloud by Mr. Barnett.)

Q. Now, subsequently did you bring to him Plaintiffs' Exhibit 3, which is the assignment at the rate of \$875.00 per month? A. Yes, sir.

Q. Was anything said as to whether or not your employment would last for the period of four months so that the payments provided for in that assignment of \$875.00 for a period of four months would not be made?

Mr. Schell: That is objected to as leading and suggestive.

The Court: Objection sustained.

Mr. Barnett: Q. Was anything said as to the length of time it would take to make those payments?

Mr. Schell: Just a moment. We object to that. I think in fairness, Mr. Barnett should follow these conversations in chronological order and not attempt to lead the witness into statements. [68]

Mr. Barnett: I think under the circumstances——

The Court: The objection is sustained.

Mr. Barnett: Q. Was anything said during the conversation relative to the length of time of your employ?

Mr. Schell: Same objection.

The Court: Objection sustained.

Mr. Barnett: Your Honor, I think under the circumstances a leading question——

(Testimony of Robert Sinclair.)

The Court: The objection is sustained.

Mr. Barnett: Q. Was anything said by Mr. Wells relative—Withdraw that.

Have you given us the entire conversation between Mr. Wells and yourself relative to the payment under that assignment?

A. (Writing): At his apartment the first time we asked very directly about the length of the job, and explained that unless we were sure of working the trucks the entire four months we would not consider purchasing them. Mr. Wells assured us that the trucks would work the whole four months.

Mr. Schell: Just a moment. May I have the reporter read back that question, as I will want to make a motion to strike part of the answer.

The Court: Read it.

(Question read.)

Mr. Schell: At this time we move to strike the answer on the ground, first, it is not responsive to the question, and secondly, that the portion starting with "Mr. Wells assured us" is a conclusion of the witness and not a statement of the conversation.

The Court: Yes. Everything after "Mr. Wells assured us" may be erased from the board and stricken from the record. [69]

Mr. Barnett: Shall I read the balance of it now, your Honor?

The Court: Yes.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Mr. Barnett: Q. What did he say in response to your statement?

A. (Writing): He said the trucks would stay on the job the entire four months, and not to worry after that. He said we could work the trucks on other Macco jobs.

(Answer read aloud by Mr. Barnett.)

Q. Now, Mr. Sinclair, you say you have been a contractor? A. Yes, sir.

Q. Has that been independent contracting work?

A. No, sir.

Q. What type of work was that?

A. That was hauling.

Q. How many trucks did you run while you were in that businesses?

A. (Writing): I owned three, but I hired as many as ten more.

(Answer read aloud by Mr. Barnett.)

Q. In that work did you become familiar with and did you work on various types of trucks?

A. Yes, sir.

Q. Can you state what the condition of the four trucks we are concerned with was when you purchased them?

A. Yes. (Writing): The trucks needed work, fan belts, water hoses, wiring, et cetera, and needed replacing. Motors, transmissions, differentials, drive lines, et cetera, were in good condition.

Q. On what day did you take delivery of these four trucks? A. I can't recall.

(Testimony of Robert Sinclair.)

Q. Approximately? A. No——

Q. Maybe you better write it there.

A. (Writing): About December 2nd, 1940.

Q. What was the first day that these trucks went to work? [70] A. December 9th.

Q. Between the 2nd and 9th, what work, if any, was done on the trucks?

A. We repacked——

The Court: Get him another piece of chalk, Mr. Bailiff.

A. (Writing): We repacked the wheel bearings, checked them over, installed headlights, and general repairs as needed.

(Answer read aloud by Mr. Barnett.)

Mr. Barnett: Q. What was the condition of the trucks on the 9th of December when you first went to work, at least when you first worked the trucks?

A. The trucks were in good condition. However, we had quite a lot of trouble. Fan belts, radiator hoses, and generators were bad. We immediately replaced the parts, and also relined the brakes on one truck, and had one hoist overhauled.

(Answer read aloud by Mr. Barnett.)

Q. After you did that work what was the condition of the trucks? A. Good shape.

Q. On January 17th or 18th what was the condition of the trucks? A. Excellent.

Q. Excellent? A. Yes.

(Testimony of Robert Sinclair.)

Q. What arrangements did you make with Mr. Wells relative to the compensation you were to receive for your personal services, as well as for the drivers, if any? A. None.

Q. How much was paid per hour for the use of the trucks?

A. (Writing): \$2.70 plus driver.

(Answer read aloud by Mr. Barnett.)

Q. Is that \$2.70 per hour per truck?

A. Per hour per truck.

Q. In addition to that how much were you to receive for the salaries of the drivers?

A. (Writing): Depending on union scales. [71]

Mr. Barnett: May it be stipulated at this time, counsel, and I take this as an offer of proof, that it was \$1.428 per hour?

Mr. Schell: I don't think that is quite correct, but I will check it.

Mr. Barnett: It is \$1.42851 per hour. I wanted that for the record; and \$9.00 for seven hours work. That is admitted in the pleadings, your Honor. I will pass that for the time being.

Q. In addition to furnishing these trucks, did you furnish your own personal services?

A. Yes.

Q. From whom did you secure the drivers?

A. (Writing): Macco hired the drivers and assigned them to the trucks.

Q. Did Macco pay the drivers to work?

A. Yes.

(Testimony of Robert Sinclair.)

Q. So of this amount of \$1.42 plus per hour, that was not credited to you at all; that was paid direct to the driver? A. That's right.

Q. Now, directing your attention to the period you actually worked on the job, can you state how many days you worked? When I say "you" I mean the trucks as well as yourself.

A. (Writing): 17 days.

Q. 17 days? A. Yes.

Q. How many hours per day did you work?

A. (Writing): Farr or myself was there all the time.

(Answer read aloud by Mr. Barnett.)

Q. How many hours per day did the trucks work?

A. (Writing): Supposed to work 21.

Q. Not what they were supposed to work; how many did they work?

A. I don't know. Do you mean—— [72]

Q. Were they on three shifts?

A. (Continuing): ——actual hours?

Q. Yes. Well, how many hours did the job work per day?

A. (Writing): 21.

Q. 21? A. Yes.

Q. When were you told that your services were no longer needed? A. Yes, sir.

Q. When was that? A. January 18, 1940.

Q. Would you state the circumstances under which you were told that?

(Testimony of Robert Sinclair.)

A. (Writing): Mr. Tucker drove up at 2:30 P. M. and told me we were all through at 3:30 P. M.

(Answer read aloud by Mr. Barnett.)

Q. Who is Mr. Tucker?

A. Assistant Superintendent.

Q. Was he on the job during the time you were there? A. Yes.

Q. Yes? A. Yes, sir.

Q. Had you had any conversation with Mr. Tucker or anyone else prior to this time as to the terms of your contract?

A. No, sir.

Q. No? A. No, sir.

Q. And on January 18th, at about 2:30 P. M. was the first time that you knew you were through, is that correct? A. That's right.

Q. Did you receive any money for the services that you rendered? A. No, sir.

Q. Did you receive money for the services the trucks had rendered? A. No, sir.

Q. Did you keep a record of the total amount of working hours worked by trucks?

A. Yes, sir.

Q. Did you keep a record of the profits made in the operations of those trucks?

A. Yes, sir.

Q. Did you estimate altogether what your net profits would have [73] been had you been permitted to complete your contract? A. Yes, sir.

(Testimony of Robert Sinclair.)

Q. Will you state how much per hour net per truck? A. Per truck net profit?

Q. I mean per truck what you would have made had the contract been completed?

Mr. Schell: To which we object as incompetent, irrelevant and immaterial, and highly speculative, with no foundation laid.

The Court: The objection is sustained. It is a jury question.

Mr. Barnett: Q. Had you had experience in keeping records of the cost, the overhead and the profits made in trucking operations?

A. Yes, sir.

Q. How many years does that experience cover?

A. Five.

Q. Five years? A. Yes.

Q. In considering the profits, what do you take into consideration?

A. (Writing): Cost of gas, cost of insurance, cost of breakdowns, cost of mechanics, cost of parts, cost of depreciation.

Q. Did you keep such a record on this job?

A. Yes, sir.

Q. What was the amount of net profit per truck hour that you made on this job?

A. 75 cents per truck hour.

Q. 75 cents per truck hour? A. Yes, sir.

Q. Did you figure that per day? A. Yes.

Q. Would that be three per day per truck hour?

A. Yes.

Q. I will withdraw it. How much would that be for your total operation per day?

(Testimony of Robert Sinclair.)

A. For total operation?

Q. Yes.

Mr. Schell: That is objected to as calling for the con- [74] clusion of the witness. It is too vague and indefinite as to how many hours the truck worked and he had worked.

Mr. Barnett: It is preliminary, your Honor. I will connect it up.

The Court: Objection sustained.

Mr. Barnett: Q. How many hours per day per truck did your trucks work on the job?

A. How many hours per—average?

Mr. Schell: Just a minute. I think the average is no good. He said he had absolute figures, of how much they worked.

Mr. Barnett: Your Honor, that is a subject of cross examination.

The Court: Objection sustained.

Mr. Barnett: Q. In arriving at that figure of 75 cents per truck hour per truck, can you state to the jury how you arrived at that figure?

A. Yes, sir.

Q. State in detail how you arrived at that?

A. (Writing): Actual expense on job: Insurance, 27 cents per truck hour; parts, 42 cents per truck hour; mechanics, 32 cents per truck hour; gasoline and grease, 58 cents per truck hour; down time, 36 cents per truck hour; \$1.95 per truck are total expenses per truck hour.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Q. How many hours per day did the trucks actually work, average, on the job, prior to the 18th day of January, 1941?

Mr. Schell: That is objected to as calling for an average. If he has the figures on how much they worked, that is another thing.

The Court: Objection sustained.

Mr. Barnett: Q. Can you tell us how many hours the trucks worked while on the job per day?

[75]

A. Not from my own records.

Mr. Barnett: For the purpose of the record, your Honor, I believe that we have the right in placing before the jury the average hours per truck per day over this period.

The Court: I have ruled that you haven't. Make up your record. I don't care to hear any argument about it.

Mr. Barnett: It was only in the spirit of cutting time and shortening the amount of detail that I asked that question.

The Court: Counsel is entitled to have the figures if they are available.

Mr. Barnett: Yes. Would your Honor care for a citation on that point?

The Court: No.

Mr. Barnett: Q. Will you look at all of these figures—withdraw that.

Does your Honor want to continue with these?

(Testimony of Robert Sinclair.)

I assure you it is going to take a considerable length of time, or would your Honor care to recess at this time? I believe it will take at least three-quarters of an hour, or an hour, in view of the objections.

The Court: Ladies and gentlemen of the jury, the Court will excuse you at this time until 10 o'clock tomorrow morning. You will observe the usual instructions regarding communications. You may now retire.

(Thereupon the jury retired.)

The Court: I can say, counsel, that I think that the total number of truck hours ought to be sufficient; counsel is objecting, and I rule very strongly on that type of proof. It seems to me if he has a record of total number of truck hours, that would be the actual amount—— [76]

Mr. Schell: The only thing that I can say, of course, is there is a divergence about these matters. The particular question I was objecting to was the average per day, and that is very material.

Mr. Barnett: All I had in mind was what your Honor said. We have added up the work sheets, and we have the total number of hours worked, and that will average so many per day. If you insist upon it we will go through each one of these, but it will take a tremendous length of time. But we have averaged them up. One day a truck may have worked so many hours, and the next day will maybe be more or less; but we have averaged them up. I don't recall the figure at the moment, but what

I was getting at was to show so many hours average per day; whether 10 or 18 hours a day is immaterial if the total is there.

The Court: I suggest you prove the total number of truck hours on the job, and then you can argue average, if you want to.

Mr. Barnett: I think you are right, your Honor. I did not think about that.

The Court: The average is a question of computation, and it is a deduction or inference you can draw from proven facts when you have the total number of hours.

Mr. Barnett: I was doing it backwards. I was going to have the average time per day.

The Court: I think you can prove the total number of truck hours.

Mr. Barnett: Very well, your Honor, I will try to get away from all this detail if I can.

The Court: Court is now in adjournment until tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken until 10 o'clock A. M. Friday, March 6, 1942.) [77]

Friday, March 6th, 1942
10 o'clock A. M.

The Court: You may proceed.

Mr. Barnett: Mr. Sinclair, please.

ROBERT SINCLAIR,

Recalled.

Direct Examination

(Resumed)

Mr. Barnett: Q. Now, yesterday you told us that your net profit per truck per hour was .75, and you set down certain figures on the board. Now, on those figures did you take into consideration the salary paid to any driver?

A. Macco paid them.

Q. Macco paid them. Was that amount in addition to the \$2.70 per hour which your trucks were to receive? A. Yes, sir.

Q. Did you during the evening recess, as suggested by his Honor, make a compilation of the total hours worked while you were on the job?

A. Yes, sir.

Q. How many hours did your trucks work during that time? Write it down if you cannot talk.

A. (Writing): 669.

Q. 669 hours? A. Yes, sir.

Q. I show you four packages of bundles of pink slips. Will you tell us what they are, please?

A. (Writing): These are time reports made out by the drivers at the end of each shift. They show the time the truck worked and the time the truck was down. Also condition of truck.

Mr. Barnett: Shall I read that, your Honor?

The Court: Yes.

(Answer read aloud by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Mr. Barnett: We offer this as plaintiffs' exhibit next [78] in order.

The Court: Is there any objection?

Mr. Schell: No objection.

(Daily truck reports marked Plaintiffs' Exhibit No. 4.)

Mr. Barnett: Q. At whose request, or under whose supervision were these work sheets made?

Mr. Schell: That is objected to as calling for the conclusion and opinion of the witness.

A. Macco.

Mr. Barnett: Q. Macco? A. Macco, yes.

Q. What would happen to the slips after they were made out?

A. (Writing) A copy was put in the office, and one was given to us.

Q. A copy was put in the office and one was given to you? A. Yes.

Q. And after each shift the driver would fill out the original and a copy, and put one in the office and give one to you, is that correct?

A. Yes.

Q. In arriving at the compilations as to the total time worked, as well as your profits, did you use those slips? A. Yes.

Q. And the other data you have told us about, is that correct? A. Yes.

Q. In checking over those slips, Mr. Sinclair, I notice that there is no record for the 9th of De-

(Testimony of Robert Sinclair.)

cember, that these records start, I believe, on the 16th of December. A. Yes, sir.

Q. Will you explain that to the jury, please?

A. (Writing) These slips were not available until the 16th.

Mr. Barnett: Should I read that, your Honor?

The Court: Yes.

(Answer read aloud by Mr. Barnett.) [79]

Mr. Barnett: Q. You mean the 16th of December, is that correct? A. Yes.

Q. Did your trucks work—withdraw that. When did your trucks first work on the job?

A. On the 9th.

Q. December 9th? A. Yes.

Q. Did they work between the 9th and 16th?

A. I have no recollection of how much they worked during this time.

The Court: That isn't an answer to the question. Did they work is the question.

A. I don't know.

Mr. Barnett: Q. Have you any recollection of whether or not they worked between that time?

A. No, sir.

Q. Do you recall them working on the 9th of December? A. Yes, sir.

Q. Did they work again on the 16th?

A. Yes, sir.

Q. Do you know what occurred between that time with reference to the workability of the trucks? A. No.

(Testimony of Robert Sinclair.)

Q. Were any repairs made, or was anything done to the trucks that day, and if so, tell us the circumstances.

A. The real work did not start until the 16th. There was only one shovel on the job. After the first day Mr. Wells suggested that we put cab shields on the trucks, which we did between the 9th and the 16th. We also put on steel sideboards, as the shovel had on wooden sideboards.

(Answer read aloud by Mr. Barnett.)

Q. What was the purpose of the cab shields?

A. It protects——

Q. The driver? A. The driver, yes, sir.

Q. It protects the driver? A. Yes, sir.

Q. Is that a steel shield that goes entirely over the cab around the driver seat? A. Yes.

Q. You mentioned something about steel planks on the truck. [80] A. Yes, sir.

Q. What was the experience, or your experience on the first day in reference to those boards that you had on them?

A. The shovel brake are wooden sideboards.

(Answer read by Mr. Barnett.)

Mr. Barnett: I think that is all, your Honor. Oh, just one question.

Q. Oh, Mr. Sinclair, you testified yesterday that at the hour of 2:30 on January 18th, you were told that you were through at 3:30. A. Yes, sir.

Q. Did you have any other notice prior to that

(Testimony of Robert Sinclair.)

day that your services would not be required for the duration of the job? A. Never.

Q. After receiving that notice, what did you do?

A. (Writing) There wasn't anything to do.

Mr. Schell: I move the answer go out as not responsive.

The Court: Objection sustained.

Mr. Barnett: Q. I have in mind reference to your securing other work or other employment or other contracting jobs for the trucks.

A. (Writing) I went to several contractors and attempted to find work for the trucks. We were unsuccessful, mainly because there was no jobs going on.

(Answer read aloud by Mr. Barnett.)

Q. Did you and Mr. Farr subsequently find employment? A. Yes, sir.

Q. Can you state to us approximately how much money you and Mr. Farr earned between January 18th and April 16th? A. Yes, sir.

Q. Would you do so, please? A. \$500.00.

Q. \$500.00? A. Yes, sir. [81]

Q. What happened to the trucks?

A. (Writing) We left them on the job.

Q. Were they subsequently repossessed or taken by Young & Son? A. Yes, sir.

Q. And subsequently sold by them?

A. Yes, sir.

Q. Do you know the amount that they sold them for? A. No, sir.

(Testimony of Robert Sinclair.)

Mr. Barnett: May it be stipulated that it is \$2,000, counsel? I believe that is what the pleadings set forth. I make that offer of proof in the spirit of saving time by not having to put Mr. Young on the stand again.

Mr. Schell: I wanted to put him on the stand to ask him a couple of questions.

Mr. Barnett: May it be stipulated he would so testify at this time, and you can put him on as far as your case is concerned?

Mr. Schell: No, I won't.

Mr. Barnett: All right.

Q. He has sent you a bill, or at least he claims you owe him \$1500?

Mr. Schell: Just a minute. That is objected to as incompetent, irrelevant and immaterial, and not the best evidence.

The Court: I think it is the best evidence. He may answer. A. Yes, sir.

Mr. Barnett: Q. Do you recall approximately how much money you spent and you became liable for in adjusting, tuning up, overhauling and making ready the auto trucks for this job; in other words, getting prepared for this job?

A. (Writing) Do you mean actually how much we spent?

Q. I mean the total amount that you spent, and what you became [82] liable for.

A. (Writing) Yes, sir, I can, approximately.

Q. Will you state it please, or write it on the board?

(Testimony of Robert Sinclair.)

A. (Writing) Approximately \$700.00.

Q. Approximately \$700.00? A. Yes, sir.

Q. In addition to that amount did you make expenditures while you were on the job, or become liable for them? A. Yes, sir.

Q. Approximately how much is that?

A. (Writing) Does that mean gas and oil?

Q. No, I don't mean upkeep; I mean expenses that might be charged against you, or that he claims for the preparation of the job, tires and things of that sort. A. \$400.00.

Q. Four? A. Yes.

Q. Or \$1100.00 in all, is that correct?

A. Yes.

Q. That doesn't include oil or gas, or anything of that sort? A. No.

Q. Were there any other expenses you incurred in preparation for this work, and when I say that I mean all during that period of a week where you made certain charges to adjust your equipment for that work?

A. Just personal expenses.

Q. Do those figures include the steel planks and the cab shields? A. Yes, sir.

Mr. Barnett: I think that is all, your Honor, from this witness. Thank you.

Cross Examination

Mr. Schell: Q. Mr. Sinclair, you say these trucks started to work on the 16th again?

A. Yes, sir.

(Testimony of Robert Sinclair.)

Q. Now, you had those trucks numbered 11, 22, 33 and 44, did you not?

A. (Writing) They were 1, 2, 3 and 4. [83]

Q. Were the numbers changed on them?

A. Yes, sir.

Q. When? A. I don't know.

Q. Later they were known as 11, 22, 33 and 44, were they not? A. Yes, sir.

Q. Now, from your tabulations, or from the original figures, the original records, will you tell us how much time the No. 11 worked on the 16th?

A. (Writing) 3½ hours.

Q. 3½ hours? A. Yes.

Q. Have you got that slip available? Can you lay your hands on that one for a moment, the No. 11 truck for the 16th?

(Document handed to witness.)

A. No, sir, I don't see it here—yes, sir.

Q. During that day I notice here that this slip is made out in apparently—it looks like a carbon.

A. Yes, sir.

Q. And then in the carbon is written the No. 11, and “3 hours” under “hours worked,” and underneath that is written “3 hours” in pencil. Who put that in? A. I did.

Q. You did? A. Yes.

Q. This record is the record kept by the driver whose particular name happens to be Walter E. Wood, wasn't it? A. Yes, sir.

(Testimony of Robert Sinclair.)

Q. How many hours did they charge in the driver's record?

A. If you will notice the half hour is down time.

Q. That makes 2½ hours net?

A. 3 hours.

Q. You have 3 hours and ½ an hour down time. Now, underneath "Remarks" is "Needs work on motor," and "Cause for delay, motor trouble," and "Further repairs needed—light switch." Those were all on there at the time, were they not?

A. Yes, sir.

Q. Will you look at your book and tell us how many hours truck No. 22 worked on that day?

A. (Writing) The same?

Q. No. 11.

A. (Writing) No, the same. [84]

Q. The same? A. Yes.

Q. Can you find the slip for truck 22 for that day? A. Yes, sir.

Q. That slip was signed by whom?

A. (Writing) By A. L. Farr.

Q. By A. L. Farr, the plaintiff in this case?

A. Yes, sir.

Q. That truck worked three and a half hours?

A. Yes, sir.

Q. That truck worked three and a half hours?

A. Yes, sir.

Q. Now, how about truck 33, did that work that day? A. No, sir.

Q. Did truck 44 work that day? A. No.

Q. You will have to answer audibly.

(Testimony of Robert Sinclair.)

A. No.

Q. It did not? A. It did not.

Q. Now, the shovels worked 14 hours that day, didn't they? A. I don't know.

The Court: You better write these answers. The reporter is not getting this, and I am not getting it, and perhaps the jury isn't.

A. (Writing) I do not know.

The Court: Will you take the responsibility of reading the answers, counsel?

Mr. Schell: Yes, your Honor. I am sorry, your Honor.

Q. Now, on the 17th, how many hours did No. 11 work? A. None.

Q. None? A. None.

Q. And the shovel worked 7 hours that day, did it not? A. I don't know.

The Court: I am sorry, Mr. Sinclair. I didn't hear it and I don't know whether the reporter did or not. Will you please write it on the board.

A. (Writing) I don't know.

(Answer read aloud by Mr. Schell.) [85]

Mr. Schell: Q. Now, how many hours did No. 22 work that day? A. 7 $\frac{1}{4}$.

Q. Have you that slip there?

A. (Writing) There are two slips for that?

(Answer read aloud by Mr. Schell.)

Q. Mr. Sinclair, I notice here on one report you say there are two slips on that, and it is signed

(Testimony of Robert Sinclair.)

by Walter Wood. It gives truck 22 as 6 hours and 15 minutes, is that right? A. Yes, sir.

Q. Then the next report for that same day is also signed by Walter Wood, and says, "Hours worked—1 hour," and "Cause for delay—other truck down." And somebody wrote in pencil here "Truck 22." A. (Writing) I did that.

Q. How much did truck 33 work that day?

A. None.

Q. None. How much did truck 44 work that day? A. Six.

The Court: Q. Six hours? A. Yes.

Mr. Schell: Q. Six hours. Now, we will skip to the 19th. The shovels worked 21 hours that day, did they not? A. I don't know, sir.

Q. You don't know? A. No, sir.

Q. How many hours did No. 11 work on that day? A. (Writing) $9\frac{1}{2}$.

Q. $9\frac{1}{2}$. How many hours did truck No. 2 work that day? A. $7\frac{1}{2}$.

Q. $7\frac{1}{2}$.

Mr. Barnett: Does counsel refer to truck 22 in that last question?

Mr. Schell: My intention was to say "22."

The Court: You said "2."

Mr. Schell: I beg your pardon.

Q. Was there any down time on No. 22 that day? [86]

A. (Writing) I think there was a half hour.

Q. On the same day, the 19th, how many hours did truck 33 work? A. $20\frac{1}{2}$.

(Testimony of Robert Sinclair.)

Q. How much down time? A. 1½ hour.

Q. 1½ hour. 20½ is the first figure, and 1½ hour for the down time, is that right? A. Yes.

Q. Have you the slip for this last truck, 33, for that date? A. Four slips.

Q. Four slips? A. Yes.

Q. May I see them, please. Mr. Farr signed one of those slips, did he? A. Yes, sir.

Q. Did you drive any of these trucks yourself?

A. (Writing) Only to and from the job, or in the yard.

(Answer read by Mr. Schell.)

Q. When you discussed with Mr. Wells the matter of doing hauling, nothing was said about your driving the trucks personally, was there?

A. No, sir.

Mr. Schell: Did your Honor hear that answer?

The Court: No, I didn't hear it.

Mr. Schell: The answer was "No, sir."

Q. In other words, you were devoting your time to the operation of the business, is that right?

A. That is true.

Q. The business of Farr and Sinclair, is that right? A. Yes, sir.

Q. That at that time was the trucking business? A. Yes, sir.

Q. Now, these mechanics you had, did you do any mechanical work in addition to the work these mechanics did? A. Yes, sir.

Q. What was the total of the mechanics' sal-

(Testimony of Robert Sinclair.)

aries and insurance during the period from December 9th to January 18th, inclusive? [87]

A. \$688.69.

Q. \$688.69? A. Yes, sir.

Q. How much additional was there for insurance?

A. (Writing) That was included in that figure.
(Answer read by Mr. Schell.)

Q. Now, there is no time included in that figure for your work or for Mr. Farr's work, is that right? A. No, sir.

Q. Better write that down.

A. (Writing) No.

Q. Have you figured out from the number of hours how much per hour mechanics' time was on those trucks, mechanics' and insurance time?

The Court: Do you mean average?

Mr. Schell: Yes, the average for the period of time they worked. A. No.

Q. Well, Mr. Sinclair, yesterday—. Oh, the answer is "No." You said that the mechanics' time was 32 cents—cost of mechanics' time was 32 cents per operating truck hour? A. Yes.

Q. You stated this morning that the total time that those four trucks worked was 669 hours?

A. Yes, sir.

Q. And your mechanics' time is \$688.69?

A. Yes, sir.

Q. So that the cost per hour of your mechanics'

(Testimony of Robert Sinclair.)

time and insurance is something in excess of a dollar an hour, is it not? A. No, sir.

Q. There were 669 hours work for all four trucks? A. Yes, sir.

Q. Now, how much was the unpaid bills for parts at the conclusion of the job?

A. (Writing) I can only make that approximation.

(Answer read by Mr. Schell.)

Q. Now, Mr. Sinclair, to refresh your memory, didn't you have [88] bills of \$716.39 at the end of the job for parts? A. No, sir.

Q. What is your approximation of the amount of the bills outstanding at the end of the job?

A. The amount of the bills was approximately \$818.00, but these bills were not all for parts.

Q. How much of them were for parts?

A. Approximately \$300.00.

(Answer read by Mr. Schell.)

Q. Now, Macco had paid some bills for you, had they not—some parts of your request?

A. (Writing) I don't know if the bills were paid.

Q. Mr. Sinclair, you say that only approximately \$300.00 of those bills were for parts. What was the balance of them for?

A. The balance was for permanent improvements on the trucks, which we considered capital investment.

(Testimony of Robert Sinclair.)

Q. Now, Mr. Sinclair, you paid \$3500 for those four trucks, is that correct? A. Yes, sir.

Q. You say when they left the job on the 17th or 18th of January they were in very good condition? A. Yes, sir.

Q. Had you made the payment to Young & Son that was due in the early part of January?

A. (Writing) Macco was supposed to make the payments direct.

Mr. Schell: I move the answer go out as not responsive.

The Court: What was the question?

(Question read.)

The Court: The answer is stricken out.

Mr. Schell: Q. Will you answer that question yes or no, Mr. Sinclair; have you made the payments? A. (Writing) No, I had not.

Q. Now, Mr. Sinclair, in your testimony yesterday you said that [89] one of the items to be taken into consideration in determining costs was depreciation. A. Yes, sir.

Q. But in your figure that you put down yesterday you had mechanics at 32 cents per hour, insurance 27 cents, parts 42 cents, gasoline 58 cents and down time 36 cents, for a total of \$1.95. Did you figure anything on depreciation?

A. (Writing) The trucks did not depreciate. They increased in value.

Q. Now, when your contracts terminated on the 18th of January, as you claimed, did you try to sell those trucks that had increased in value?

(Testimony of Robert Sinclair.)

A. No.

Q. In the figures that you had down on the board in determining costs, did you have anything for wear and tear on tires? A. Yes, sir.

Q. Where was that? A. I mean no, sir.

The Court: The answer was "No."

Mr. Schell: Q. You had included nothing in your cost for depreciation or for tires?

A. No, sir.

Q. What is the cost per operative truck hour on tires on this type of truck? Have you ever kept a record of that?

A. Yes, but I could not say offhand.

Q. To refresh your recollection, isn't it about 20 cents per operated hour?

A. (Writing) I don't know, sir.

Q. Now, this insurance that you had here was 27 cents,—as an item, what kind of insurance does that cover?

A. (Writing) Collision, property damage, public liability.

(Answer read by Mr. Schell.)

Q. That is the 27 cent item, is that right?

A. Yes.

Q. Now, under your arrangement with Macco you also paid the compensation insurance on the drivers, did you not? [90]

A. (Writing) I don't know.

Q. Mr. Sinclair, you went into the office of the

(Testimony of Robert Sinclair.)

Macco Construction Company from time to time and checked your account, didn't you, with them?

A. (Writing) Only once.

Q. Only once? A. Yes.

Q. And when was that?

A. (Writing) At the time we were terminated.
(Answer read by Mr. Schell.)

Q. At that time you went over the accounts with Mr. Tucker, did you not? A. Yes, sir.

Q. No mention was made at that time of any contract between you and Macco?

A. (Writing) I don't remember.

Q. You don't remember. Isn't it a fact that at that time Mr. Tucker showed you an itemized list of all the income and the expenses?

A. Yes, sir.

Q. At that time you stated that this account was substantially correct, did you not?

A. Yes, sir.

Q. You said "Yes"? A. Yes.

Mr Schell: Did your Honor hear that "Yes, sir"?

The Court: Yes.

Mr. Schell: Q. In that there were several additional items, were there not, such as payroll, taxes, like social security?

A. (Writing) I have here an item that reads, "Drivers' time compensation at 11 per cent—8979."

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

Q. That item was not figured by you in arriving at your cost of operation, was it?

A. No, sir.

Q. Did you figure anything for social security to drivers? A. No, sir.

Q. You said that you figured mechanics' time at 32 cents an [91] hour? A. Yes, sir.

Q. How did you figure that?

A. (Writing) Under normal operations we would use one mechanic per shift at \$9.00.

(Answer read by Mr. Schell.)

Q. In your direct examination you said that you had made a profit of 75 per cent.

The Court: 75 cents.

Mr. Schell: 75 cents per operated hour per truck. A. Yes, sir.

Q. During the period from December 9th to January 18th? A. Yes, sir.

Q. In arriving at that figure did you take in the actual cost of the mechanics that you put out in this particular time?

A. (Writing) Most of the mechanical work was done for the purpose of putting the trucks in shape for the job, and naturally was charged to capital investment.

(Answer read by Mr. Schell.)

Q. Isn't it a fact, Mr. Sinclair, that taking in all of the expenses, whether they were charged by you to capital or otherwise, that the operations

(Testimony of Robert Sinclair.)

during that period from December 9th to January 18th resulted in a loss?

A. I don't know how——

The Court: Just write your answer on the board?

A. (Writing) I don't know how to answer that.

(Answer read by Mr. Schell.)

Mr. Schell: Q. Mr. Sinclair, this account that you went over with Mr. Tucker, which you said was substantially correct, had \$300 and some odd dollars in it, didn't it, left in the hands of Macco?

A. (Writing) Approximately \$400.

Q. A little less than \$400, wasn't it?

A. No. [92]

Mr. Schell: The answer was "Approximately \$400."

Q. There were \$810 worth of outstanding bills, is that right? A. That's right.

Q. Or \$818, wasn't it? A. Yes.

Q. That didn't even take into account your assignment to Young & Son? A. No, sir.

Q. In these computations or cost of operations you made, you haven't included anything for your time, or for the time of Mr. Farr, have you?

A. No, sir.

Q. What do you figure the value of your time?

A. \$1.25 per hour.

Q. \$1.25 per hour? A. Yes, sir.

Q. What do you figure the value of Mr. Farr's time? A. (Writing) The same.

(Testimony of Robert Sinclair.)

The Court: Is that going to be somewhat protracted, counsel?

Mr. Schell: I have about 10 or 15 more questions, your Honor.

The Court: We will take a short recess now. Court will be in recess.

(Recess.)

Mr. Schell: Q. Mr. Sinclair, in arriving at these various figure of so much per operated hour for mechanics, you were using the basis of the trucks working 21 hours a day, were you not?

A. Yes, sir.

Q. Therefore, if the trucks didn't average 21 hours a day, each of these figures per hour would go up? A. No, sir.

Q. Well, in taking mechanics at \$9.00 per day——

Mr. Barnett: May I suggest that the witness wants to write something down, your Honor. [93]

A. (Writing): I allowed for breakdown time.
(Answer read by Mr. Schell.)

Mr. Schell: Q. Will you tell us, just by way of example, in arriving at the item of parts of 42 cents per operated hour, just how you arrived at that?

A. (Writing): I took the actual cost of the parts purchased on the job, and divided it into the total number of hours worked.

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

Q. What was the sum you used as the total cost of the parts? A. (Writing): \$262.34.

(Answer read by Mr. Schell.)

Q. Mr. Sinclair, did you take into consideration the three hundred odd dollars worth of bills for parts that were still outstanding?

A. (Writing): Those bills were not for parts.
(Answer read by Mr. Schell.)

Q. Mr. Sinclair, I understood you to say a little while ago that \$300 worth of those were for parts?

A. (Writing): I said approximately.
(Answer read by Mr. Schell.)

Q. Did you include that \$300 in the amount of the cost of the parts?

A. (Writing): I don't understand.
(Answer read by Mr. Schell.)

Q. Let us get it this way: How much did you actually pay out yourself for parts in cash?

A. (Writing): I did not purchase parts for cash. The money I paid out was for improvements.
(Answer read by Mr. Schell.)

Q. What do you call improvements?

A. (Writing): Anything that improves it, such as headlights, windshields, et cetera.

(Answer read by Mr. Schell.)

Q. Now, Mr. Sinclair, in arriving at the cost of mechanics' [94] time, will you put down how you arrived at that?

(Testimony of Robert Sinclair.)

A. (Writing): Total?

Q. The mechanics' time?

A. (Writing): I have, sir.

Q. I thought this was parts.

A. (Writing): I said under normal operations we would use one mechanic per shift at \$9.00.

(Answer read by Mr. Schell.)

Q. Now, taking a three shift day, that would be how much for mechanics—\$27.00, would it not?

A. Yes.

Q. Put that down, will you.

A. (Writing): Yes.

Q. How many hours of truck time did you use for that same period?

A. (Writing): Each truck and 21 hours per day, or 84 truck hours.

Q. That gave you 32 cents, did it?

A. Yes, sir.

Q. Then that figure contemplated that each truck worked the full 21 hours every day?

A. (Writing): I allowed for breakdown time at the rate of 12 truck hours per day. Actually on the job, breakdown time was 9 per cent.

(Answer read by Mr. Schell.)

Q. Is that how you arrived at this figure of 36 cents? A. Yes, sir.

Q. That is the cost of the man, the driver, while you are paying the driver for breakdown time?

(Testimony of Robert Sinclair.)

A. (Writing): The cost of driving and also lost time.

(Answer read by Mr. Schell.)

Q. Mr. Sinclair, you stated you had been in the trucking business how long?

A. (Writing): Since 1939.

Q. What business were you in in September and October, of 1940?

A. I had sold out to my partner and was looking for a job with trucks.

(Answer read by Mr. Schell.)

Q. When had you sold to your partner?

A. (Writing): About [95] August 30th.

(Answer read by Mr. Schell.)

Q. What was that partner's name?

A. (Writing): C. E. Butler was involved—. May I erase that?

Mr. Schell: Yes, as far as I am concerned you may erase that.

A. (Writing): T. W. Bowlin.

Q. By the way, Mr. Sinclair, on this hauling that you did there at the Bethlehem job, where was that hauling from and where to?

A. (Writing): From the hill to several different places.

Q. What are some of the city streets you went over?

A. (Writing): I don't know the names of any except Third Street.

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

Q. And Third Street is a street in the City of San Francisco? A. Yes.

Mr. Schell: Did your Honor hear that? He said "Yes."

The Court: Yes.

Mr. Schell: Q. What type of work did you do from the 9th of December to the 18th of January? What duties did you perform?

A. (Writing): I helped our mechanic.

Q. Did you do any supervising of the operation of the trucks, that is, watch the drivers to see that they properly drove them?

A. (Writing): Yes, only as far as their driving was concerned.

(Answer read by Mr. Schell.)

Q. Did you also let any men go?

A. No, sir.

Q. Mr. Farr did all the firing?

A. Yes, sir.

Q. At the time that you had the conversation with Mr. Wells when you presented the guaranty to him and he stated that he did not have any authority to sign it, had you purchased the trucks at that time? A. No, sir.

Q. Where did you do your mechanical work? Did you a job? [96]

A. (Writing): We used an old building at the Bethlehem yard along with other truck owners.

(Answer read by Mr. Schell.)

(Testimony of Robert Sinclair.)

A. (Writing): We were all requested to move out, and thereafter did our work in the open.

Mr. Schell: He has added, "We were all requested to move out, and thereafter did our work in the open."

Q. During the time from December 9th, 1940, to January 18th, 1941, did you devote all of your business time to the operation of this trucking business? A. Yes, sir.

Mr. Schell: I think that is all.

Redirect Examination

Mr. Barnett: Q. Mr. Sinclair, you were asked by Mr. Schell on cross examination the total time paid to the mechanics, and I believe you stated it \$688.00, and then you were asked the total hours worked. Would you like to explain that answer as affecting the arriving at your net profit?

A. Yes, sir.

Q. Would you do so, please?

A. (Writing): The mechanical work which was done on the trucks was anticipated. We expected to have to spend quite a sum of money to put these trucks in shape. Naturally, this amount cannot be charged to normal operation expenses. If we had been permitted to finish the job, the normal operating expenses for mechanics would have been the figure established.

Mr. Schell: We move to strike the last portion of the answer as a conclusion of the witness; that is, that portion from, "if we had been permitted," on to the end.

(Testimony of Robert Sinclair.)

Mr. Barnett: Your Honor, it is elementary. It goes to [97] the explanation for total operating expense.

The Court: I think the answer may remain. I will let it go at that.

Mr. Barnett: Q. Mr. Sinclair, will you look at those work sheets that you have?

A. These?

Mr. Barnett: Yes. May I have one of those, Mr. Bailiff, please.

(Paper handed to Mr. Barnett.)

Q. Now, these work sheets are entitled "Daily Truck Report." Then appears a printed designation, "Date." Then printed "Truck Number," "Hours Worked," "Hours Down," "Truckloads," "Shovel Number." Then below that is printed "Cause for Delay." Then immediately under that appears the printed matter "Gasoline, Motor Oils, Transmission Oils, Hoist Oils, Chain Oils, Condition of Truck, Repairs Needed." Now, was it the customary practice that after each trip the driver would fill in the blanks provided for those things that required attention?

A. After each shift.

Q. And after the designation, "Condition of Truck," I notice in some of these appears the word, "O. K." Then in others appears no comment at all, and in a few of them—I don't seem to have one here. Do you happen to have one there

(Testimony of Robert Sinclair.)

in your hand that has some other designation after the words "Condition of Truck"?

(Paper handed to Mr. Barnett.)

Q. (Continuing): In others appear the designation, such as the one I am reading from, "Brakes adjusted." Where there is no comment in any of these, Mr. Sinclair, would that mean anything?

Mr. Schell: Just a moment. That will be objected to as calling for the conclusion of the witness as to what was in the driver's mind by failure to say anything. [98]

The Court: I don't think it is objectionable. I think we all know what the situation would be. If there was no comment there was nothing expected to be wrong with the truck.

Mr. Barnett: That is all we are asking here.

Q. Will you answer that, please?

A. (Writing): Evidently that truck was O. K.

(Answer read by Mr. Barnett.)

Q. In the absence of any writing behind the designation "Condition of Truck," the truck was O. K.? A. Yes.

Q. Now, counsel has called your attention to the fact, if it be a fact, that on the 9th of December, and on the 16th of December, and other days, trucks 11, 22, 33 and 44 worked less than—I will strike that; worked three and a half hours, and other smaller number of hours. Would you explain to the jury how that came up?

(Testimony of Robert Sinclair.)

A. (Writing): Mr. Birch's foreman told us at the beginning of each shift told us how many of our trucks he could use. We were continually arguing with Mr. Birch and complaining because he only once, on December 9th, said "All four trucks." He would sometimes remove our truck at the half shift and put our driver on some other truck.

Q. You were only paid for the actual number of hours that your truck worked, is that correct?

A. Yes, sir.

Q. "Yes, sir." At the time that you first went to work there were there any Macco trucks on the job?

A. No, sir.

Q. When did they come on the job, if you know?

A. (Writing): After January 16th.

Q. That is after your services were terminated?

A. Yes, sir.

Q. In referring to the amount of net profit which you made, you were asked whether or not you took into consideration social security and compensation insurance. I will ask you now [99] whether or not those two items were included in the \$1.42 which was paid by Macco in addition to the \$2.70?

A. (Writing): I understood at the time of the contract that Macco was to pay driving, and also s. s.

(Answer read by Mr. Barnett.)

Q. Is that "s. s." for "social security"?

(Testimony of Robert Sinclair.)

Mr. Schell: I move to strike the answer. It is a conclusion of the witness.

The Court: Objection sustained. The answer is stricken.

Mr. Barnett: Q. Was that told to you by anyone?

A. (Writing): Mr. Wells said Macco would take care of the drivers' wages.

(Answer read by Mr. Barnett.)

Q. Do you know what was paid for drivers per hour at that time? Do you know what the rate was?

A. (Writing): I believe it was \$9.00 for seven hours.

Q. You stated on cross examination that you did not believe that the trucks decreased in value, but increased in value. Would you state to the jury, or explain to the jury how you came to that conclusion?

A. (Writing): The trucks did not have headlights or windshields or tail lights or cab shields when we got them. We installed all of these.

Q. What were the condition of the tires—withdraw that. Did you purchase any new tires for your trucks?

A. We purchased five spares.

Q. I notice in one of these work sheets, Mr. Sinclair, after the designation "Signed" appears "R. Sinclair." Is that you? A. No, sir.

Q. Someone else by that name, is that true?

(Testimony of Robert Sinclair.)

A. Yes, sir.

Q. Do you know whether or not Mr. Farr was paid for any time [100] that he actually drove any trucks?

A. (Writing): He was not paid.

(Answer read by Mr. Barnett.)

Mr. Barnett: That is all, your Honor.

Recross Examination

Mr. Schell: Q. As far as driving, that was a service you rendered in connection with your business when a driver didn't show up?

A. It turned out that way.

Q. By the way, neither one of you belong to the union, do you?

Mr. Barnett: Your Honor, I will object to that.

Mr. Schell: I think that is material as far as personal time is concerned as a driver.

The Court: I think he may answer.

A. (Writing): I belonged to Local 490, Vallejo, but I was behind in dues. Mr. Farr had made application to 490, but had not been initiated.

Mr. Schell: Q. You didn't transfer down to San Francisco?

A. (Writing): I tried. I asked Mr. Wells if he would advance the money to pay my back dues out of our earnings, but he refused to do so.

(Answer read by Mr. Schell.)

Q. Mr. Sinclair, truck No. 11—withdraw that, if the Court please. Have you made a list at all

(Testimony of Robert Sinclair.)

of the various notations about trouble with the trucks that are included in all those different slips you had? A. No.

Q. Truck 33 broke an axle, did it not?

A. It might have.

Q. And it broke a transmission shaft?

A. (Writing): I don't know, sir. [101]

Q. And it broke a spring?

A. (Writing): I don't know.

Q. It had to have one rear wheel repaired?

A. (Writing): That's right, yes, sir.

Q. And you had to have something done to the transmission because the gears stuck, didn't you?

A. No, sir.

Q. One of the trucks had to have a new rear axle put in?

A. (Writing): I don't know.

Q. Would you call those things improvements?

A. No, sir.

Q. Now, Mr. Sinclair, at no time from December 1st up to and including April 16th, 1941, did you or Mr. Farr, or the firm of Farr and Sinclair, have a city carrier's permit from the Railroad Commission of the State of California?

A. No, sir.

Q. You had had a permit with Thomas Bowlin from October 21st, 1940, to November 15th, 1940, at which time it was revoked, isn't that true?

Mr. Barnett: I will make the objection it is incompetent, irrelevant and immaterial.

(Testimony of Robert Sinclair.)

The Court: Objection sustained.

Mr. Schell: That is all, your Honor.

Mr. Barnett: No further questions, your Honor. I will question Mr. Young, your Honor, and then the plaintiff will rest. Mr. Young, please.

FRANK YOUNG,

Recalled for the Plaintiffs; Previously sworn.

Direct Examination

(Resumed)

Mr. Barnett: Q. Mr. Young, we are interested in how much you sold these trucks for?

A. I sold them for \$2,000.

Q. How much do Farr and Sinclair, according to your records, owe you? A. \$1,500. [102]

Q. I don't recall if I asked you yesterday or not if you had received any payment under this assignment from Macco Construction Company?

A. I have not.

Mr. Barnett: That's all.

Mr. Schell: Just a minute.

Cross Examination

Mr. Schell: Q. When you sold the trucks, to whom did you sell them?

A. To Weaver Motor Company. In fact, I traded them in on other trucks.

Q. Were the trucks worth less when you sold

(Testimony of Frank Young.)

them the second time than when you sold them to Farr and Sinclair?

A. I couldn't say whether they were or not. I don't know.

Q. By the way, did you have to tow those trucks to get them into your shop?

A. I believe there was one towed in on account of not having a battery.

Mr. Schell: That is all.

Mr. Barnett: That is all.

Mr. O'Neill: May I ask the witness a question to straighten out a matter?

The Court: Yes, if there is no objection.

Mr. Schell: No objection.

Mr. O'Neill: Q. Mr. Young, you stated in response to counsel's question, as I understood you, that you figured they owed \$1,500. A. Yes.

Q. You arrived at that, did you not, by taking the contract price of \$3,500, subtracting \$2,000 which you received on the sale, leaving a balance of \$1,500? A. Yes, sir.

Mr. O'Neill: That is all.

Mr. Barnett: Plaintiff will rest, your Honor.

[103]

The Court: Ladies and gentlemen of the jury, you are excused now until 2 o'clock, and please observe the former instructions given you by the Court. You may retire until 2 o'clock.

(Thereupon a recess was taken until 2 o'clock P. M. of the same day.) [104]

Friday, March 6th, 1942, 2 o'clock P. M.

Mr. Barnett: If your Honor please, I am asking your Honor's permission to reopen the plaintiffs' case for the limited purpose of offering a document in evidence which purports to be filed with the Railroad Commission, December 5th, 1940, and subsequently delivered to Mr. Sinclair. I don't believe there is any objection to this offer.

Mr. Schell: May I see it for a moment? I don't think there is any objection, but may I see it for a moment?

(Paper handed to Mr. Schell.)

Mr. Schell: We have no objection. It is stipulated in this letter of transmittal in connection with the permit, counsel has stipulated that no permit was applied for.

Mr. Barnett: There was an application, but the application was subsequently withdrawn. This was filled in in December, and the application was subsequently withdrawn, and this document which was filed with the Railroad Commission, consisting of a letter, as well as an insurance policy, was given by the Railroad Commission to Mr. Farr, and the application was withdrawn.

Mr. Schell: We will stipulate no permit was ever issued.

Mr. Barnett: No, no permit was ever issued. We offer that as plaintiffs' exhibit, and the plaintiff can now rest.

The Court: The case can be reopened by stipulation that this document was received.

Mr. Schell: We will stipulate he may reopen the case for the purpose of offering that document.

The Court: The document is received by stipulation. Plaintiff now closes its case. [105]

(Letter dated December 4th, 1940, and insurance policy attached thereto marked "Plaintiffs' Exhibit No. 5.")

Mr. Schell: Now, I file a separate motion.

The Court: Motion denied. Proceed.

Mr. Schell: Mr. Gerhart, please.

J. R. GERHART

called for the Defendants; Sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. J. R. Gerhart.

Mr. Schell: Q. What is your occupation, Mr. Gerhart?

A. Secretary-treasurer and business manager of the Building Material Drivers' Union.

Q. Is that union in San Francisco?

A. It is.

Q. The Building Material Drivers' Union has jurisdiction over the members, the people that drive dump trucks? A. Yes, it does.

Q. Was that so in the period of December and January—December of 1940 and January of 1941?

A. Yes.

Q. Through your office did you send out drivers for work on dump trucks? A. We do.

(Testimony of J. R. Gerhart.)

Q. Are you familiar with the job that was done, known as the Bethlehem Steel job that was going on in December of 1940 and January of 1941?

A. Yes, it was a job—yes, I am.

Q. Did you furnish drivers for dump trucks on that job? A. I did.

Q. That is, through the union in your official capacity with the union? A. Yes, I did.

Q. Did you furnish any drivers—withdraw that. Were you familiar with the Farr and Sinclair trucks that were on that [106] job?

A. I am familiar with all of the trucks that were on the job. There may be some that I just couldn't recall to memory. We had trucks in from Napa, and we had trucks in from——

The Court: Just confine yourself to the Farr and Sinclair trucks.

A. The Farr and Sinclair trucks were Autocars—I believe four of them.

Mr. Schell: Q. Four Autocar dump trucks?

A. Yes, sir.

Q. Did you send any drivers for the operation of those trucks? A. Yes.

Q. State whether or not you had any difficulty obtaining drivers for those trucks.

Mr. Barnett: Just a moment. We will object to that question on the ground it is incompetent, irrelevant and immaterial, and no proper foundation has been laid, and based on hearsay.

(Testimony of J. R. Gerhart.)

The Court: No, I think I will overrule the objection. He may answer.

A. What was the question?

Mr. Schell: May the reporter read back the question?

The Court: The reporter will read the question.

(Question read.)

A. I did.

Mr. Barnett: And further, calling for the conclusion of the witness.

The Court: Objection overruled.

Mr. Schell: Q. What difficulty did you have in that regard, Mr. Gerhart?

Mr. Barnett: The same objection, your Honor.

[107]

The Court: Objection overruled.

A. The question was, what difficulties did I have?

Mr. Schell: Yes.

A. The drivers objected to going on the trucks because they were not sure, due to the condition, how long they would be able to operate them. We work on a half and a whole day basis, and the men work in several shifts.

Mr. Barnett: I ask the answer be stricken out as based on hearsay and not made in the presence of either of the plaintiffs.

The Court: Objection overruled.

Mr. Schell: You may cross examine.

(Testimony of J. R. Gerhart.)

Cross Examination

Mr. Barnett: Q. You receive a salary, do you, from this union? A. I do.

Q. Is either Farr or Sinclair a member of your union? A. Yes, sir.

Q. Do you know who paid your drivers for the work that they were doing?

A. Macco Construction Company.

Q. Are they ones that asked you to send the drivers out? A. They were.

Q. Do you still do business with Macco Construction Company? A. We do.

Q. How many drivers did you send out during the period from December 9th to April 16th?

A. That would be hard to say. Macco's record would show.

Q. Well, approximately?

A. That would be hard to state. We had calls for drivers to go on and men turned the jobs down and wouldn't take the jobs.

Mr. Barnett: That is, the Macco job.

A. For the Sinclair trucks. [108]

Q. Do you remember the date that this occurred? A. What was that?

Q. Do you remember the date that this occurred?

A. No, I have no way of knowing. We don't keep a record of the dates that our men are sent to the jobs. We send them, and they get work for one day or they get work indefinitely.

(Testimony of J. R. Gerhart.)

Q. Did Macco furnish all the drivers for all the trucks on this job?

A. To the best of my knowledge.

Q. Do you remember any of the other trucks on the job?

A. Yes, there was a man from Sunnyvale.

Q. Pardon me?

A. There was one from Sunnyvale. I don't recall the contractor's name. We paid little attention to that because the drivers were hired through Macco. Those coming from the outside, they were allowed to bring a driver for each piece of equipment provided they were members of the particular union from the territory in which they resided.

Q. Who allowed that?

A. That is by agreement between local unions in Northern California.

Q. The union allowed the owner of a truck to bring one driver, is that true?

A. That is true.

Q. Did I understand you, Mr. Gerhart, and did you mean to convey to his Honor and to this jury, that when Macco would phone for a driver or drivers they would tell you what equipment that driver was to be on?

A. Yes.

Q. That is true?

A. Yes, that is true.

Q. What equipment did the Hayward Company have?

(Testimony of J. R. Gerhart.)

A. Autocars; no, not Autocars. They had, I believe, some Internationals. I am not positive of that. That has been quite some time ago. There was many different kinds of equipment on the job. [109]

Q. What other makes? You explained specifically about the Autocars and the Internationals. Now, what other makes?

A. Macks and Whites. I am not certain of the type of equipment the Hayward Company operates, but I have seen equipment both on Macco's job and on Treasure Island.

Q. Have you ever seen the Farr and Sinclair equipment? A. Yes.

Q. When was that?

A. That was part of the time while it was working on the Bethlehem job of Macco's; and part of the time while it was standing on the job.

Q. Was that standing in November, December, January, February or March?

A. I imagine it was around that time.

Q. What year?

A. About two years ago, I should judge.

Q. Do you know how many trucks Macco had operating during that period?

A. No, I wouldn't. You mean his own and hired?

Q. I mean the total number of trucks.

A. I wouldn't know.

Q. You have no idea of the total number of drivers furnished? A. No.

(Testimony of J. R. Gerhart.)

Mr. Barnett: That is all.

Mr. Schell: That is all.

Mr. Crawford, please.

FRED CRAWFORD,

called for the Defendants; Sworn.

The Clerk: Will you please state your name to the Court and jury. A. Fred Crawford.

Mr. Schell: Q. Keep your voice up, Mr. Crawford, so we can hear you, please. Now, what is your occupation? [110] A. Truck driver.

Q. By whom are you employed now?

A. Macco Construction Company.

Q. How long have you been operating trucks?

A. About 20 years.

Q. Did you work down on the Bethlehem job in December of 1940? A. Yes.

Q. Do you know the Farr and Sinclair trucks, the Autocar dump trucks? A. Yes.

Q. Did you ever drive one?

A. I drove one one day.

Q. When was that? A. The first day.

Q. Did you drive it thereafter? A. No.

Q. Why not?

A. No good; I wouldn't drive them.

Q. Why wouldn't you drive them?

A. Well, they just was in my estimation unsafe for me to drive. They might be safe for some fellows, but I didn't think so.

(Testimony of Fred Crawford.)

Q. In what regard were they unsafe?

A. There were no shields over them, no protection in driving. The brakes might hold and might not, and you had to be up in there to kind of hold them, and with the shovel swinging around with the dirt you are liable to get hit on the head.

Q. How were the operations otherwise? For instance, when you dumped how were they?

Mr. Barnett: Just a moment, your Honor. I make the objection that this witness drove one truck on one day. The question now is as to the operations of the trucks. The objection is based on the ground that the proper foundation has not been laid.

Mr. Schell: I think the objection is well taken.

Q. How about this particular truck, so far as the hoisting and dumping of material was concerned? [111]

A. It would hoist all right if you didn't have too big a load to rear up on you.

Q. It would do what?

A. It would rear up. The load would kind of hang up if you wasn't pretty careful with them.

Q. Did you see the other—withdraw that. Did you continue to drive down there on that job thereafter? A. Yes.

Q. You will have to answer audibly.

A. What is that?

Q. You will have to answer out loud.

A. Yes, I drove the rest of the job down there.

(Testimony of Fred Crawford.)

Q. What kind of trucks did you drive there-after?

A. Oh, Macks, Internationals and Sterlings.

Q. Did you see these trucks, these Autocar dump trucks from time to time on the job?

A. Yes, I seen them there.

Q. Did you notice whether or not they were frequently broken down?

A. Well, yes, they were in the shop quite a little bit.

Mr. Schell: Take the witness.

Cross Examination

Mr. Barnett: Q. Where do you work now, Mr. Crawford?

A. For Macco Construction Company over in Oakland.

Q. Who have you talked to about this case?

A. The attorney.

Q. When?

A. The day before yesterday, I guess was the first time I did.

Q. What did he say, and what did you say?

A. He just asked me if I drove the trucks down there, and I said yes, I drove them one day.

Q. How long that day?

A. An hour and a half of a full day. [112]

Q. Are you familiar with those little pink slips, those work slips? A. Yes.

Mr. Barnett: Mr. Bailiff, would you hand those to the witness?

(Papers handed to witness.)

(Testimony of Fred Crawford.)

Q. What is, or what was the purpose of those slips? A. These here (indicating).

Q. Yes.

A. Well, it is the date, the number of hours worked, hours down, how many loads you made, and shovel number.

Q. Is it customary for you drivers to fill out those slips? A. Yes.

Q. What do you do with them?

A. Turn them in to the office.

Q. Did you fill out one on this occasion, the occasion that you drove this one truck for an hour and a half?

A. Well, I made out a time card.

Q. I ask you now, Mr. Witness, if you filled out a pink slip similar to the one you have in your hand?

A. I wouldn't know because they change—no, I wouldn't think so, because I think they changed the forms afterwards. They had a different system the first day.

Q. Were you driving for Macco and Company, and they assigned you to drive one of these Farr and Sinclair trucks? A. Yes.

Q. Who was the one that assigned you to that job? A. Burch, the foreman.

Q. Who was Burch?

A. He was foreman of the Macco.

Q. Foreman of the Macco Construction Company? A. Yes.

(Testimony of Fred Crawford.)

Q. Did you know what truck you were going to drive prior to the time you were assigned to it?

A. Not any particular num- [113] ber. He says, "You drive one of Farr and Sinclair's trucks."

Q. When did he so inform you?

A. When you got on the shift.

Q. About how long after you came on the shift?

A. After I came on?

Q. In other words, suppose the shift started at 7 o'clock; when would you know what truck you were going to drive?

A. Maybe 10 or 12 minutes before, if your regular truck was not broke down.

Q. That would be the time, is that correct?

A. That would be the time, yes. Sometimes it would be 7 o'clock; maybe right on time, or maybe a few minutes after.

Q. But the assignment was made with your arrival on the shift, is that correct? A. Yes.

Q. You were sent out there by the union, were you? A. Yes.

Mr. Barnett: That's all.

Redirect Examination

Mr. Schell: Q. You say you got an hour and a half in on the whole shift. What was wrong the rest of the time; why didn't you work the rest of the time? A. It was in the shop.

Mr. Schell: That is all. Mr. Meinn, please.

LOUIS MEINN

Called for the Defendants; Sworn.

The Clerk: Will you state your name to the Court and jury? A. Louis Meinn.

Mr. Schell: Q. What is your occupation?

A. Truck driver.

Q. By whom are you employed now?

A. Macco Construction Company.

Q. Have you ever worked down on the Bethlehem job? [114] A. Yes, sir.

Q. When did you work down there?

A. Oh, I went to work in January of 1941.

Q. You went to work in January of 1941?

A. Yes.

Q. Are you familiar with the Farr and Sinclair trucks that were down there?

A. When I went down there the union sent me down there, and I went down there and saw the foreman, and he said, "Yes, I can put you on this afternoon," so he took me down and showed me these Autocars, and I looked at the Autocars and I didn't know whether to go to work or not. It was in the heart of the winter time, and I was not working very steadily, so I thought I would take them for a day.

Q. Did you drive one for a day?

A. I drove one for a day.

Q. Have you driven one since?

A. Not since.

Q. What is the reason why you haven't driven one since?

(Testimony of Louis Meinn.)

A. Well, there was so much trouble the first day I drove it, you would get under the shovel and you couldn't get out because the motor would die. When you would start out the motor would die most of the time, and you would have to get out and crank it. So I thought one day would be enough for me.

Mr. Schell: That's all.

Cross Examination

Mr. Barnett: Q. Mr. Meinn, how long have you worked for Macco?

A. How long have I worked for Macco altogether?

Q. Yes.

A. I would say about four years off and on.

Q. You are working for them now?

A. I am working for them now.

Q. Who have you discussed this case with?

A. I have never discussed it with anybody except that they told me that they [115] wanted me down here as a witness.

Q. You know what I mean by discussing—talking about it? A. Talking, yes.

Q. Did I understand you to say that you haven't talked about this case?

A. The only person I talked about this case to was Tucker, and he told me he wanted me for a witness on them Autocars.

Mr. Barnett: That's all.

Mr. Schell: That's all. Mr. Carlson, please.

OSCAR CARLSON

Called for the Defendants; Sworn.

The Clerk: Will you state your name to the Court and jury? A. Oscar Carlson.

Mr. Schell: Q. What is your business or occupation? A. I am a truck driver.

Q. Who are you working for now?

A. Macco Construction Company.

Q. Did you work down on the Bethlehem job?

A. I did.

Q. As a truck driver? A. Yes, sir.

Q. Are you familiar with the Farr and Sinclair trucks that were down there? A. Yes.

Q. Autocar trucks? A. Yes.

Q. Did you ever drive one? A. No.

Q. Have you ever seen them operate?

A. I did.

Q. What did you notice about their condition?

A. Well, not so hot.

Q. When you say not so hot, what do you mean? What condition were they in, Mr. Carlson?

Mr. Barnett: Your Honor, I will object to that. This witness hasn't driven one. There is no testimony he ever looked [116] at one or inspected one.

The Court: Objection sustained. The last answer is stricken.

Mr. Schell: Q. Did you observe the Autocars, Mr. Carlson, in their operations? A. I did.

Q. Many times?

A. I was working right alongside of them.

Q. You were working right alongside of them?

(Testimony of Oscar Carlson.)

A. Yes.

Q. Did you see whether or not they were worked constantly or otherwise?

A. I thought they was a bunch of cherry pickers on them first, but I found after——

Mr. Barnett: I ask that answer be stricken.

The Court: Stricken out.

Mr. Schell: Just answer the question.

Q. Did you observe their operations as to whether they operated well or not?

A. Well, there was one hill you had to come down. They was hauling from the upper shuttle. They had to come down a ramp. The rest of us truck drivers, we had to give them the right-of-way. That is the only thing. And then on the dump, they was kind of ticklish there.

Q. In what respect?

A. They had so much overhang that they had to have a load dumped on, or they would rear up in the front, stand up on their back wheels.

Q. Did you observe whether or not they broke down?

A. Yes, they was delayed quite a bit.

Q. Were you ever asked to drive one of these trucks? A. I was.

Q. Did you drive it?

A. I heard I was going to be asked.

Mr. Barnett: I will object to that.

The Court: Objection sustained.

Mr. Schell: Q. Did you ever refuse to drive one of those trucks? [117]

(Testimony of Oscar Carlson.)

Mr. Barnett: Same objection, your Honor.

The Court: Objection sustained.

Mr. Schell: That's all.

Mr. Barnett: No questions.

JOHN KEENAN,

Called for the Defendants; sworn.

The Clerk: Q. Will you state your name to the Court and jury? A. Johnny Keenan.

Mr. Schell: Q. What is your occupation?

A. Truck driver.

Q. How long have you been a truck driver?

A. I drove for Granfield for 14 years steadily, and I drove a year since they dissolved partnership.

Q. Did you work down at the Bethlehem job, San Francisco, in December or January of last year?

A. I worked in January, three weeks, last year.

Q. While you were there were there some Auto-car dump trucks of Farr and Sinclair down there?

A. Yes, there were.

Q. Did you observe those trucks as you were down there on the job? A. Yes, I did.

Q. What observation did you make of them?

A. Well, I was out of employment, and I was looking for a job, and I kind of watched all the contractors' trucks that were there, trying to pick

(Testimony of John Keenan.)

out one to get established on. I didn't pay much attention to those trucks because they were kind obsolete.

Q. Did you ever drive one of them yourself?

A. No, I never have.

Q. Did you observe them as they were operating out there? A. Yes, I did.

Q. What did you observe about them?

A. I watched the fellows. [118] They couldn't make a living on them. They would work two or three hours a day and break down, and when they would come to work on the shift they wouldn't have a truck. That was the main thing I was particularly interested in.

Mr. Barnett: I move to strike the answer as a conclusion of the witness and not responsive.

The Court: Stricken out.

Mr. Schell: Take the witness.

Mr. Barnett: No questions.

Mr. Schell: May these witnesses be excused now?

The Court: I am not interested in them.

Mr. Schell: All right, you may all go if you wish. Mr. Burch?

ARTHUR BURCH,

Called for the Defendants; sworn.

The Clerk: Will you state your name to the Court and jury? A. Arthur Burch.

(Testimony of Arthur Burch.)

Mr. Schell: Q. Mr. Burch, where do you live now? A. In Houston, Texas.

Q. By whom are you employed?

A. Macco Construction Company.

Q. By whom were you employed in December and January of last year?

A. Macco Construction Company.

Q. In what capacity were you working for them? A. Foreman.

Q. Where were you working?

A. Bethlehem Steel.

Q. When did the excavation start down there—about?

A. I believe it was on around, about the 9th of December.

Q. On that first day did you have any records of trucks that the drivers made out?

A. No, I believe we didn't.

Q. They came later? A. Yes. [119]

Q. At the time when you first started the job did you observe the Farr and Sinclair trucks down there? A. Before they started the job?

Q. Assuming it was the 9th of December, were the Farr and Sinclair trucks there that day?

A. Yes, sir.

Q. How many were there? A. Four.

Q. Did they operate on that day?

A. Part of the day.

Q. Was there a steam shovel or a power shovel down there? A. Yes, sir.

(Testimony of Arthur Burch.)

Q. Loading those trucks? A. That's right.

Q. You say that they operated part of the day.
Did your shovel operate all day? A. Yes, sir.

Q. What did you observe about those trucks?

A. They were not in shape to go to work.

Q. What did you notice in that regard?

A. That the material, that is, hose connections and fan belts, wiring, and one thing another, was rotted out.

Q. Did you have a conversation with either Mr. Farr or Mr. Sinclair about that on that day?

A. Yes, sir.

Q. With whom did you have the conversation?

A. I forget if it was either one or both of them.
I think it was Mr. Farr.

Q. State in substance what you said to him and what that conversation was.

A. I told him that the trucks were not in shape and that we couldn't use them in the condition they were in.

Q. What did he say?

A. He said they were going to work on them and try to get them in shape.

Q. Did you then say anything more?

A. I don't remember saying any more at that time, no.

Q. Did the trucks work then the following day?

A. No, sir.

Q. How long was it before they worked again?

(Testimony of Arthur Burch.)

A. Several days. I forget now just how long it was. It was quite a little while.

Q. During that time, say—withdraw that. The job started on a Monday? A. Yes, sir.

Q. That was a five-day week job at first?

A. Yes.

Q. You worked that week. Now, did you have any further conversation with Mr. Farr or Mr. Sinclair about these trucks? A. Yes, I did.

Q. When was the next conversation, if you remember?

A. Well, it was perhaps a day or two later.

Q. Where did that conversation take place?

A. Well, in the shop.

Q. What was that conversation?

A. Well, they asked me when I was going to let them go back to work, and I told them I didn't know, that I didn't think they were going to work because they were all done.

Q. What did they say?

A. They said they had been working on them and got them back in shape.

Q. Did you say anything more?

A. I think a day or so later they asked me about it again, and I said I would take it up with Mr. Wells and see if they could go back.

Q. Then, did you tell them later they could?

A. Yes, sir.

Q. And did they go back? A. Yes, sir.

Q. What did you observe about the trucks after that?

(Testimony of Arthur Burch.)

A. Well, that they still was not the right kind of equipment for that job under the circumstances.

Q. In what respect?

A. Well, a hill like we had to go down, they didn't have sufficient brakes, I didn't think, for it, and they were dangerous; and they were not standing up like they should. [121]

Q. Now, in this type of work you were doing down there, were you running trucks in such a manner that one followed after *the at* the shovel?

A. Yes.

Q. Did the fact that those trucks couldn't operate on account of the Farr and Sinclair trucks cause any trouble?

A. Yes, sir.

Mr. Barnett: I am going to object to that as leading and suggestive.

Mr. Schell: Q. What effect did the breakdown of a truck have upon your operations?

A. It would cause a delay at the shovel because the shovel had to wait.

Q. Did you go to Farr and Sinclair about the condition of the trucks after they had got back to work this next time?

A. I don't remember now, but I think I did. I told them that they weren't—they still weren't what they should be.

Q. What did they say?

A. That they were fixing them up. They thought they could keep three out of the four running.

Q. Did they operate all the time; for instance,

(Testimony of Arthur Burch.)

when the shovel was operating were they always in working condition?

A. No, they didn't. They were not always in working condition.

Q. Did you have any further conversation with Farr and Sinclair about the condition of those trucks? A. Not that I remember.

Mr. Schell: That's all. Take the witness.

Cross Examination

Mr. Barnett: Your Honor, may I have the reports, the work reports, please?

(Papers passed to Mr. Barnett.)

Mr. Barnett: Q. Mr. Burch, do you know what these papers [122] are in Plaintiff's Exhibit 4?

A. I presume they are the time sheets.

Q. Would you look at those and tell me whether or not you had anything to do with them?

A. Yes, sir, this is the foreman's sheet that the drivers use for that time.

Q. On that job, is that correct?

A. Yes, sir.

Q. Have you ever driven any of these trucks that we are talking about? A. No, sir.

Q. Do you want us to understand that the reason these pieces were fired from the job is because the equipment was faulty? A. That's right.

Mr. Schell: We object to the question, and move the answer be stricken on the ground that the question is argumentative.

(Testimony of Arthur Burch.)

The Court: He said "Yes." Let the answer stand.

Mr. Barnett: Q. In regard to these work tags that were made out by your driver—that is true, isn't it?

A. The driver of the truck, yes, sir.

Q. And you furnished those drivers?

Mr. Schell: Just a moment. That is calling for a legal conclusion as to who furnished the drivers.

The Court: He can answer. This is cross examination. If he doesn't know he can say so.

A. If anybody was short of drivers he would have somebody call the hall for a driver.

Mr. Barnett: Q. Yes, and then you would assign the driver to not only Farr and Sinclair but other contractors on the job, is that true?

A. No, sir; that is not necessarily true. When Farr and Sinclair or any other truck owner wanted a driver, they might tell me or they might call themselves [123] or have somebody in the office call for a driver, and the driver would report to them.

Q. If they tell you, you would call the union and the union would send out a driver, is that not true? A. Yes, I think that is correct.

Q. Yes. Under this arrangement or agreement you were to pay Farr and Sinclair's drivers whatever amount you might have agreed with the drivers to pay, is that true?

A. I don't know just how that worked.

Q. You knew nothing about that? A. No.

(Testimony of Arthur Burch.)

Q. Did you have charge of assigning, each morning, trucks to each shift?

A. I would tell the truck owner how many trucks I needed; if I needed more or if I didn't.

Q. Do you have that discretion in telling what truck drivers were to work on that particular shift?

A. Not truck drivers, but I would tell the owners.

Q. That is what I mean. For example, how many trucks did you have on that job?

A. I don't remember just how many it was.

Q. For the purpose of demonstrating that only, assume you had 40 trucks on the job. You would select of that number of trucks those you wanted to work on a particular shift, and you would inform the truck operator or the truck owner of that, wouldn't you?

A. Yes, sir.

Q. In other words, you had in your discretion the right to determine who would and who would not work on a particular shift, isn't that true?

A. Yes, sir.

Mr. Barnett: That's all.

Redirect Examination

Mr. Schell: One more question, if I may, please:

[124]

Q. Mr. Burch, at the time, during December and January did you need all the trucks that were available for your work?

A. Yes, sir.

Q. In other words, did you have work for all of

(Testimony of Arthur Burch.)

the trucks that were available at that time in operating condition?

A. I think we had, as near as I can remember.

Q. You had a good deal of rain that year, didn't you?

A. Yes, sir.

Mr. Schell: That's all.

Recross Examination

Mr. Barnett: Q. As a matter of fact, at first you had your own shovel up there, isn't that true?

A. Yes.

Q. Isn't it also true that on that occasion, or during the time you had your own shovel, you didn't have work for all of the trucks?

A. We didn't have all the trucks there at that time.

Q. You had Farr and Sinclair's trucks there?

A. Yes.

Q. And when you brought in a second shovel you had, naturally, more work for more trucks, isn't that true?

A. We brought in more trucks, yes.

Q. How many shovels did you have originally?

A. Two to start with.

Q. How many did you finally build up to?

A. Three shovels apiece.

Mr. Barnett: Three shovels apiece. That's all.

Mr. Schell: That's all. Mr. Tucker, please.

O. H. TUCKER

Called for the Defendants; sworn.

The Clerk: Will you state your name to the Court and jury. [125] A. O. H. Tucker.

Mr. Schell: Q. Mr. Tucker, what is your profession?

A. I am a civil engineer employed by the Macco Construction Company; as their field engineer during January and December—I mean during January and December until April I was assistant superintendent.

Q. You are talking now about December, 1940, and January of 1941? A. That's right.

Q. Did you work down there on the Bethlehem job?

A. I did. I went to work there on the 16th of December.

Q. Did you stay there until the end of the job?

A. I did.

Q. Did you know Mr. Farr and Mr. Sinclair?

A. I do.

Q. When did you first meet them?

A. At the Bethlehem Steel plant.

Q. What type of work was this job down there?

A. Excavation of a hill and the disposal of the material in a waste dump.

Q. Disposal of the material in a waste dump?

A. Yes, sir.

Q. How was the material moved from the hill?

A. It was loaded onto trucks by power shovels and hauled to a dump some 4000 feet from the hill.

(Testimony of O. H. Tucker.)

Q. Did you observe the Farr and Sinclair trucks on this job? A. I did.

Q. How long have you been in the construction business? A. Since 1926.

Q. And as such have you worked with trucks?

A. I have.

Q. What kind of trucks did Farr and Sinclair have down there? A. Autocars.

Q. Did you ever take a look at the trucks?

A. Very closely.

Q. What did you observe about them?

A. I observed they were not a modern truck; they had open cabs; no protection [126] for the driver; that they did not have tail gates; they had what was known as a rock body, but the shut was not adequate, that is, sufficient.

Q. When you observed those trucks were you on the job watching the work going on? A. Yes.

Q. Did you observe those trucks in operation?

A. I did.

Q. Did you notice whether or not they broke down?

A. They were on the job quite often.

Q. Mr. Tucker, in your position as assistant superintendent and engineer, were the records of Macco on that job kept under your direction and control? A. They were.

Q. That was part of your duties?

A. Yes, sir.

(Testimony of O. H. Tucker.)

Q. Besides the Farr and Sinclair trucks, how many trucks did you have on the job?

A. The greatest number we had at any one time, I would say, was four or five.

Q. At the start of the job, how many did you have? A. Approximately 30.

Q. By the time you came up there, was there more than one shovel working?

A. Two shovels were working.

Q. And later you had how many?

A. Three.

Q. Did you have other truck owners operating trucks on that project? A. We did.

Q. Do you remember who else was working on that project?

A. There was the Sibley Truck & Grading Company. There was the Devincenzi Brothers. There was the Hayward Building Materials Company. There was A. Bronzatti of Walnut Creek, and F. Bronzatti of Walnut Creek. There was Nello Giorgi of San Francisco. There was Peter Suchez of San Francisco. There may have been one or two more. I would have to refer to my records if you want a complete list. [127]

Q. That will suffice for the moment. Did those people continue to work throughout the entire length of the job?

Mr. Barnett: We will object on the ground it is immaterial and has no bearing on the issues of this case.

(Testimony of O. H. Tucker.)

The Court: Objection sustained.

Mr. Schell: Q. Mr. Tucker, did you have any conversation with Mr. Farr or Mr. Sinclair prior to their leaving the work?

A. Several conversations.

Q. When was the first one?

A. Probably the first day I was on the job.

Q. Do you remember what that conversation was?

A. I imagine—no, the first day on the job, I wouldn't remember that, no.

Q. Do you remember talking to them at a later time? A. I talked to them several times.

Q. About what?

A. They were always wanting an advance, and I told them to check up the record and see if they had any money coming and if they did I would take it up with Mr. Wells. And the first time they had no money coming, and so I didn't take it up with Mr. Wells. A few weeks later they asked again, and I asked Mr.—

Mr. Barnett: If your Honor please, may we have the conversation that took place?

The Court: I don't consider this is competent.

Mr. Barnett: I was going to urge the objection on that.

The Court: The witness is stating the conversation about the advance. I don't know that that is an issue here.

Mr. Schell: I didn't want to lead the witness.

(Testimony of O. H. Tucker.)

Q. Did you have any conversation with them at any time about the condition of their trucks?

A. I did.

Q. When was that?

A. Approximately ten days before they were [128] told that their trucks were not any longer needed.

Q. Where did that conversation take place?

A. In the office.

Q. Who was present?

A. I think myself and Mr. Sinclair.

Q. What was the conversation?

A. At that particular time they wanted us to give them a purchase order so that they could obtain some parts to repair the trucks.

Q. What was the conversation?

A. The conversation went something like this: Mr. Sinclair asked me if he could get a purchase order to obtain parts, and I asked him how much it would be and he said not over \$10 or \$15. So I either wrote one myself or told the office man to write one for him.

Q. Was anything else said about the trucks or their condition at that time?

A. Nothing I would want to testify to on the stand.

The Court: What is that?

A. Since I have to repeat the conversation, I wouldn't swear that it would be right, sir.

Mr. Schell: Q. You mean that there were other general conversations that you don't remember?

(Testimony of O. H. Tucker.)

A. Yes, sir.

Q. Did you ever talk with Mr. Farr or Mr. Sinclair about their leaving the job?

A. Approximately a week before I remember a conversation, as I was just coming into the office, and Mr. Sinclair or Mr. Farr stopped me and asked me how much longer they would be on the job, and I said they won't be much longer. At that time I suggested that they contact Eaton & Smith, who had just been awarded a contract by Kaiser for work in Richmond.

Q. What was the reply?

A. The reply was they wanted to know how to get out and see them, and I gave them directions.

Q. At that time were other trucks laid off?

A. We had been laying trucks off——

Mr. Barnett: Objected to as incompetent, irrelevant and [129] immaterial as to the trucks.

Mr. Schell: I don't want to argue that, but——

The Court: There was some statement on your part in opening that there were many other trucks put on the job at this time.

Mr. Barnett: January 16th, your Honor, yes.

The Court: I think if that is competent, why, this also is. He may answer. Read the question.

(Question read.)

A. Could I refer to my records?

The Court: I am going to reverse myself on that. I don't think that is material. That would

(Testimony of O. H. Tucker.)

bring up the question of why they did that, and I don't want to go into that; and it would take the witness some time to find out, anyway. I will sustain the objection.

Mr. Schell: Q. Mr. Tucker, did you have any conversation with Mr. Farr or Mr. Sinclair about their laying off about the 16th of January?

A. About the 16th of January?

Q. Yes.

A. I don't recall one on the 16th of January. I recall one on the 18th of January when they were actually laid off.

Q. Where did that conversation take place?

A. Down on what is known as the Western Pacific dump, just off of Third Street.

Q. Is that where the material was being hauled?

A. That is where the dirt was being hauled, and Farr and Sinclair were using——. Farr and Sinclair had one corner of that spot they were using for a shop, and Sibley had another, and that took place in the spot Sinclair and Farr was using as a shop.

Q. That was not on the Bethlehem property?

A. No.

Q. Where was that conversation?

A. I drove up and told them [130] they were through at 3:30, I think it was.

Q. What did they say?

A. They shrugged their shoulders and said nothing.

(Testimony of O. H. Tucker.)

Q. Did you see them at a subsequent date?

A. About a week or ten days later they came into the office and wanted to check hours and the amount of money they had coming. Macco had prepared a statement for them, and I went over it with them and showed them how many hours they had worked and how much they had coming and what the documents were and what the net was, and they wanted to know if they could have it, and I said, "No, there was an assignment out and there was some outstanding bills that had been presented to us in their case."

Q. What did they say then?

A. They thanked me and went on out the door.

Q. Did they ever at any time say anything to you about having a contract with Macco for any specific period of time? A. Never.

Q. Before they asked you, did they say anything about the correctness of this account?

A. I took it from their—they were satisfied that it was substantially correct and met with their approval.

Mr. Barnett: Your Honor, I will ask the answer go out as not being responsive.

The Court: It won't be stricken for that reason. It will be stricken because it is a conclusion of the witness. He is not testifying to any fact at all; merely as to how he took it as to what they believed.

Mr. Schell: Q. Was anything said, as near as

(Testimony of O. H. Tucker.)

you can remember, in substance in the conversation regarding that account?

A. Was anything said as to the correctness of the account? [131]

Q. Yes, that's right.

A. There was nothing said—there was nothing said about the incorrectness of the account.

Q. Now, Mr. Tucker, have you taken the records showing this—withdraw that, please. Did Macco keep records of the number of hours that the shovels worked on this job? A. They did.

Q. Do you have the information available as to the number of hours that the shovels worked, job hours worked on December 9th to the 18th of January?

A. I have that record—17-1/3 shifts—and a shift is 7 hours.

Q. The total number of hours—17-1/3 shifts?

A. I take that back. That is 17-1/3 days, and a day is 24 hours, so that is 364 hours.

Q. 364 hours that the job worked?

A. Yes, sir.

Q. Did you make any compilation as to how many hours each individual truck of Farr and Sinclair worked during that period of time?

A. I did.

Q. Now, there were 364 hours that the job worked, is that right? A. Yes.

Q. How many hours did truck No. 11 work?

Mr. Barnett: Your Honor, does there seem to

(Testimony of O. H. Tucker.)

be any dispute as to the total number of hours that the plaintiffs worked?

The Court: Well, proceed.

A. That is in your file.

Mr. Schell: What?

A. That is in your file?

Mr. Schell: May the bailiff take this up to the witness?

(Paper handed to the witness.)

Q. I think this is the one you were looking for.

A. Thank you. Truck 11 worked 129 hours.

Q. How many hours did truck 22 work?

A. 202 hours.

Q. And 33? A. $157\frac{3}{4}$. [132]

Q. And 44? A. $108\frac{1}{4}$.

Q. $108\frac{1}{4}$? A. Yes, sir.

Q. Have you totaled them to determine how many hours worked by all the trucks was during that period? A. 597 hours— $597\frac{1}{2}$.

Q. These others pertain to the work of Farr and Sinclair——

A. I might correct myself back there. At the time that Mr. Sinclair and I and Mr. Farr discussed the bill on December 9th, when the job first started, there were no records available, and an arbitrary 38 hours was agreed upon between ourselves as a fair number of hours to add to that day, and that 38 hours would have to be added to this total, making $635\frac{1}{2}$ hours.

(Testimony of O. H. Tucker.)

Q. Did you keep a record of the gasoline that was used by Farr and Sinclair? A. I did.

Q. And the oil and grease? A. I did.

Q. And the drivers' compensation?

A. I did.

Q. And the total operating drivers' time and insurance? A. I did.

Q. And the mechanics and the insurance?

A. I did.

Q. And the—by the way, did you purchase any tires?

A. We purchased one tire for Farr and Sinclair.

Q. Did you purchase any parts?

A. A few minor parts.

Q. Did you keep a record of that?

A. We did.

Q. And then did you have invoices presented at your office for other parts? A. We did.

Q. And furnished to Farr and Sinclair?

A. Yes.

Q. Did you make some computations, Mr. Tucker, regarding the cost per hour of these various items? A. I did.

(Papers handed to witness.)

Q. What does that show—cost per hour of those various items? [133]

A. It shows that the cost per hour, per operated hour of gasoline was 44.7 cents; cost of oil and grease 14.6 cents.

Q. Not quite so fast.

(Testimony of O. H. Tucker.)

A. Gasoline was 44.7 cents, and oil and grease was 14.6 cents.

The Court: Haven't you got this in exhibit form?

Mr. Schell: I would be glad to offer that as an exhibit.

The Court: The witness is testifying from a typewritten document.

Mr. Barnett: I have no objection to this type of a stipulation, that he would repeat what was on that piece of paper, reserving, of course, the correctness of it and the authenticity of the document. But he would testify as it appears.

Mr. Schell: We will accept that, and we will offer that in evidence, if the court please.

The Court: On that stipulation it is admitted in evidence.

(“Cost of Operating Farr & Sinclair Trucks” marked “Defendants’ Exhibit A.”)

Mr. Schell: Q. In making the computation with those items of expense, I mean the cost of hourly operation, did you take anything at all for their time, for Farr and Sinclair's time?

A. No, sir.

Q. Did you take any depreciation on tires, outside of that one tire you purchased?

A. No, sir.

Q. You just took that price as the tire depreciation, is that right? A. Yes, sir.

Q. Did you have any attachments served on you? A. We did.

(Testimony of O. H. Tucker.)

Mr. Barnett: Object to that as incompetent, irrelevant and immaterial. It has no bearing on this contract.

The Court: Objection sustained. I think that relates to other issues which are not here at present. I don't see any [134] other purpose for that.

Mr. Schell: I think possibly it is covered in this assignment, anyway, your Honor.

Mr. Barnett: If that is a fact, your Honor, I would ask the Court's permission to look at this instrument, which I stipulated may be admitted for the purpose of this witness saying what was on it, but if it has any immaterial matter on it I certainly object to that. Then counsel says it is covered by that—why I don't want to stipulate to that.

Mr. Schell: I didn't make myself clear. I was talking about bills——

The Court: If it is on here I can't find it.

Mr. Schell: It was rather an unfortunate remark by me. It didn't mean that.

Q. Did you observe the condition of the Farr and Sinclair trucks as they were operating?

A. I observed the trucks as they were operating, yes.

Q. State whether or not you had any difficulty obtaining drivers to operate those trucks?

A. That was a matter that Burch took care of.

Q. Mr. Burch took care of that?

A. Yes; my evidence would be hearsay.

Mr. Schell: That's all.

(Testimony of O. H. Tucker.)

Cross Examination

Mr. Barnett: Q. Mr. Tucker, in a way I am sorry I looked at this, but I anticipated and intended to ask you that that would show a loss, is that not correct?

A. Those are the facts.

Q. On your computation it is based on the time actually worked, [135] is that correct?

A. That's right.

Q. Did you take into consideration that if the contract had been permitted to continue for the full period we contend it was agreed upon, that is, 120 days, when you figured this computation——

A. Did I do what?

Q. Did you take into consideration what the result would be if the contract ran 120 days?

A. I checked the facts as they were up to that time. I am not making those conclusions. That is not a conclusion. I mean—I don't mean a conclusion—a supposition.

Mr. Schell: Mr. Barnett, I beg your pardon. I overlooked covering something, and perhaps it would be easier for you to go on with your cross examination if I could reopen the direct examination, if that is agreeable with counsel and the Court.

The Court: Counsel is examining. It is up to him.

Mr. Barnett: I would like to finish with this thought, and I will accede to your request.

(Testimony of O. H. Tucker.)

Q. Without arguing, Mr. Witness, what I have in mind is this: In making this computation, did you take into consideration the fact that this contract, had it ran 120 days, what the loss or profit might have been?

A. No, because there were certain other things that would not be included in there.

Q. You refer now to the work of Farr and Sinclair?

A. Yes, but I mean if I had made a statement, I mean my opinion of what the cost per hour of operating those trucks was, if the trucks had been on the 54 days that the job ran instead of the 17 that it did, why, I would have endeavored to estimate on the basis of my experience what those various items would be.

Q. Is it not a fact, Mr. Tucker, that on jobs of this type and character, when they start, when the contractors are getting [136] under way, they have certain initial expenses, and they don't know what they will be until after they get started, is that not a fact?

A. That is a fact in certain cases; but not in this.

Q. I anticipated that; but in this particular case, as far as Farr and Sinclair are concerned, that was not the fact, was it?

A. I was not present on the job until the 16th. I can only testify to what I know thereafter, after the 16th. At one time I pointed out to both Mr.

(Testimony of O. H. Tucker.)

Farr and Mr. Sinclair that their outside mechanics was running over a dollar an hour, and that was a good deal higher than the owner ought to pay for four trucks. I suggested to them at that time that they make arrangements with the union to either be allowed to do their own mechanical work or drive a truck in order that they could cut down their overtime. They were unable to do that, they told me several days later, saying that those arrangements could not be made, and they were forced to hire a trouble shooting mechanic at each shift.

Mr. Barnett: May I ask that the answer be stricken as not being responsive?

Mr. Schell: That was responsive. It was a general question, as I remember.

The Court: No, I will permit it to remain.

Mr. Barnett: Q. Now, you say ten days prior to the time this contract was terminated—that would be about January 8th—that you had a conversation with Mr. Sinclair or Mr. Farr relative to the expenditure of \$10 or \$15 for parts, is that correct?

A. I didn't say 10 days. I said several days before.

Q. I may be mistaken, but my notes indicate that ten days [137] before you told them the trucks were not needed. You had that conversation?

A. I couldn't testify to ten days—I would say several.

(Testimony of O. H. Tucker.)

Q. Getting back to the occasion when they asked you for \$10 or \$15—do you recall that?

A. Yes.

Q. According to your records how much money had they earned at that time?

A. I couldn't answer that now.

Q. Well, you were in charge of the records, weren't you?

A. Yes, sir, but I can't tell what their earnings are day by day. I can figure it out if the Court will grant a 15 minute recess.

Q. Well, his Honor will decide that, Mr. Witness. Let me ask you this: What is the total amount of money that these boys earned up to and including the 18th of January.

A. The total amount of money earned?

Q. Yes, sir.

A. The trucks earned \$1708.42, which is——

Q. Now, is there any way of determining of that seventeen hundred odd dollars how much had been earned approximately ten days before the services were terminated? Would you answer that yes or no, please.

A. If——

The Court: Wait a minute. I want to know first if that is gross?

A. Yes, sir, that is gross.

Mr. Barnett: Yes, that is what I asked, your Honor.

A. If I can add it up here within a few minutes——

(Testimony of O. H. Tucker.)

Mr. Schell: May the reporter read the question, your Honor? I think the answer is to be yes or no.

The Court: Read the question.

(Question read.)

A. Yes.

The Court: The answer is "Yes."

Mr. Barnett: Q. Could you do it please? [138]

The Court: No, I don't think I will permit that.

Mr. Barnett: Q. You say the dump was some four thousand feet from the hill, is that correct?

A. That's right.

Q. Can you tell me this, whether or not at the inception of this contract if the dump was on the Bethlehem property at the start of it?

A. At the start of the job?

Q. Yes.

A. At the start of the job there was a few thousand yards to be hauled onto the Bethlehem property, and the rest was to be hauled to waste dump.

Q. So that at the start of the project the dump was on the Bethlehem property?

A. That's right.

Q. You state that you had a conversation with Mr. Sinclair relative to the finding of other employment, and I recall, according to my notes, that you mentioned something about Eaton & Smith. They are contractors, is that not true?

A. That's right.

Q. Would it refresh your recollection, Mr. Tucker, if I stated that it is a fact that this con-

(Testimony of O. H. Tucker.)

versation relative to the securing of employment from Eaton & Smith took place after they were discharged by you?

A. I again—after they were discharged I reminded them again of the possibility of working at Eaton & Smith.

Q. You had two conversations, then, in which Eaton & Smith were mentioned? A. Yes, sir.

Q. However, you do admit that one of them took place after the termination of their services?

A. Either after or at the same time their services were terminated.

Q. Do you recall when the Macco trucks came on the job? A. I do. [139]

Q. What was the date, please?

A. On January 30th.

Q. They came from San Diego, is that correct?

A. Yes.

Q. Were they on the job there for some time?

A. They were on the job in San Diego for approximately from the 10th of Decemebr to just before the 30th of January.

Q. There has been introduced in evidence here. Mr. Witness, some pink slips known as work sheets. Are you familiar with them?

A. Yes, I have the originals of them right before me—the blue.

Q. Those are the green sheets you have there?

A. These are the blue ones.

Q. Have you had the opportunity of inspecting the pink ones? A. I have not.

(Testimony of O. H. Tucker.)

Q. Is it customary and is it your practice that the carbon should be between the green or blue one, as you call it, and the pink one?

A. No, there is a tissue paper intervening.

Q. And then there is a carbon, is that correct?

A. Yes, a double-faced carbon.

Q. And these pink slips are duplicates of the original?

A. They are really triplicates, yes, sir.

Q. What were your instructions to the drivers with reference to these work sheets; and I refer now to the Bethlehem job?

A. Our particular instructions were to show the truck number, the date they worked, the hours worked, the hours the truck was driven, the number of loads they hauled, who the truck was owned by, and their names. There was a space on there for the drivers to put down the condition of the truck and repairs needed. But we never gave them any instructions on that, because these were a form that we have used for our own [140] trucks, and those columns were for when we were operating our own trucks.

Q. You furnished these forms? A. Yes.

Q. You furnished the drivers?

A. The union furnished the drivers.

Q. You say the union furnished the drivers, but as far as Farr and Sinclair were concerned—and I don't want to quibble with you—but you paid the drivers?

A. Sir?

(Testimony of O. H. Tucker.)

Q. You paid the drivers?

A. The drivers were carried on our payroll.

Q. Why, of course. Were these sheets used by you in any method for the computation of the amount of money paid to the drivers, or to Farr and Sinclair?

A. They were used for both purposes.

Q. They were records, in other words?

A. Yes.

Q. Is that correct? A. Yes.

Mr. Barnett: That is all of the cross examination.

Redirect Examination

Mr. Schell: Q. This possibly may not be re-direct examination, but something I overlooked on direct. Mr. Tucker, how many actual working days did this job take?

A. 54—55-1/6 days.

Q. When was the work completed?

A. The work was completed on the 16th of April.

Q. During the——

A. I might correct myself. The mass production of the job was completed in 55-1/6 days. There was remaining after the 9th day of April 9018 yards of clean-up, and that took us, because of rain and slow conditions, it took us another eight days.

Q. But your mass hauling was completed—— [141]

(Testimony of O. H. Tucker.)

A. Our mass hauling was completed in 55-1/6 days, and our big shovels moved out.

Q. Now, how many days of those 55 did Farr and Sinclair operate? A. 17-1/3.

Q. 38 or 39 after they left, is that right?

A. Yes.

Q. When you say "so many days," that is so many days of 21 hours?

A. So many days of 21 hours each.

Q. You said in connection with cross examination that there were some other factors that you had to take into consideration in these costs—some additional costs.

A. Yes, for instance, that summary sheet with four trucks and 16 tires, there was only one tire charged in there. If a long time operation was considered, or even a 55 day operation your tire repairs—tire replacements and repairs would amount to more than is shown on that sheet.

Q. Did you take into consideration the time that Farr and Sinclair put in on that work?

A. It should be considered on a sheet that was prepared with that in mind.

Q. Was depreciation taken into consideration?

A. It wasn't.

Q. Now, you say that the hourly rate—I notice on there—you said something in your testimony about hourly rate for mechanics; you mean for a truck operated hour?

A. Yes, there was in addition to the carrying

(Testimony of O. H. Tucker.)

of the Farr and Sinclair drivers on the Macco payroll, we carried the Farr and Sinclair mechanics on our payroll, and the total money paid them divided by the number of hours the trucks worked gives you the hourly cost of mechanical services.

Q. In your work as engineer and assistant superintendent and other work you have done on construction, you have had something to do with cost accounting of jobs? [141-A] A. I do.

Q. When you are operating your own trucks you keep the cost accounting of that?

A. It is kept under my supervision.

Q. It is kept under your supervision?

A. Yes.

Mr. Schell: I think that is all.

Recross Examination

Mr. Barnett: Q. Mr. Tucker, you said that this job took 55 or 66 days for the mass production?

A. Right; that is right.

Q. However, you did not include a period of how many days for this cleaning up?

A. Eight days.

Q. Then, the job was actually completed in 63-1/6 days, is that correct.

A. That's correct.

Q. In the remaining eight days did you use any trucks?

A. I beg your pardon. I wish to correct myself. That 55-1/6 days is of 21 hours each, and the remaining 8 days—2 of them are 16 hours. How many did I say?—16?

(Testimony of O. H. Tucker.)

Q. Yes, sir.

A. Let's start all over. Of the remaining 8 days, 3 of them were all 8 hours, 6 of them were 16 hours, and two holidays.

Q. Now, I think you are getting too many days. Three for what?

A. Three for 8 hours, three for 16, and two for holidays.

Q. So that would make the total number of days 63-1/6, with the last 8 days for the hours you have indicated?

A. 5-1/6 days at 21 hours.

Q. And of the other 8 days, 3 were for 8 hours, 3 for 16 hours, and 2 for holidays, is that correct?

A. That is correct.

Q. Did you work on those days?

A. No; it is elapsed time is all I am referring to. [142]

Q. Well, I am referring to work days.

A. Yes, sir.

Q. Then, it would be only six more work days?

A. Yes, sir.

Q. Then you didn't go back on the job after that? A. No, sir.

Q. You state in your computation of the profits, if any, you did not take into consideration any depreciation? A. That's right.

Q. What is the reason for that?

A. I merely made up a record of what it cost to operate those trucks, of the known expenses, and that does not purport to be a cost sheet. That in-

(Testimony of O. H. Tucker.)

cludes any unknown factor, or any assumed factor.

Q. Depreciation is an unknown factor?

A. You have to assume or arbitrarily take some figure.

Q. One other question: You put into your computation a total amount of money paid to mechanics while Farr and Sinclair worked, is that right?

A. That is correct.

Q. You made no provision as a part of that amount was capital?

A. I wouldn't say; I wouldn't consider any item like capital.

Q. I am not asking you that, Mr. Witness. I merely asked you whether or not any part——

A. I would say no part of it was capital.

Q. You took all as operating expense?

A. Yes.

Mr. Barnett: That's all.

Mr. Schell: That's all.

I state to the Court now that I have the deposition of Mr. Wells. Shall I read it now?

The Court: How many more witnesses do you have?

Mr. Schell: We have no more.

The Court: You may read it.

Mr. Schell: This is the deposition taken of Mr. Ben F. Wells, on July 16, 1941, in the office of Mr. Barnett at 111 [143] Sutter Street, San Francisco, California. I am reading from the copy. Maybe I should read it from the original, if there are any corrections.

“BEN F. WELLS,

one of the defendants, called as a witness on behalf of the plaintiffs, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

“Examination by Mr. Barnett

“Mr. Barnett: Q. What is your name, please?

“A. Ben F. Wells.

“Q. Where do you reside, please?

“A. 926 Powell Street.

“Q. By whom are you presently employed?

“A. Macco Construction Company.

“Q. In what capacity?

“A. Construction superintendent.

“Q. And how long have you occupied that position?

“A. Going on seven years.

“Q. Generally, Mr. Wells, what are your duties?

“A. Well, we take care—I take care of the construction jobs. I run them and operate the job.

“Q. By that, you mean you hire and fire employees? A. Yes, sir.

“Q. Make contracts for the work in connection with the jobs?

“A. Well, to a certain extent; just for ordinary verbal contracts, or something like that.

(Deposition of Ben. F. Wells.)

“Q. Well, you have the authority, I take it, to make verbal contracts in connection with certain jobs which are under your supervision? Is that correct? A. That’s right.

“Mr. Schell: Just a moment. I will object to that as calling for a conclusion of this witness, and being too broad and indefinite, and move the answer, if there was one, go out [144] for the purpose of the objection.

“Mr. Barnett: Q. Well, as general superintendent, have you charge—I will withdraw that. Directing your attention to the subject matter of this controversy—and that is the Bethlehem Steel job—is that the way you designate it? A. Yes.

“Q. You designate it in a way that you will know what we are talking about. Will you do that, please? A. Yes.

“Q. What was the job?

“A. It was a dirt moving job at the Bethlehem Steel.

“Q. And where was the work to be done?

“A. Well, it would be about 20th and Illinois.

“Q. In this City and County?

“A. Yes, sir.

“Q. And about how much dirt was involved?

“A. Around 600,000 yards.

“Q. Now, did you have anything to do with the securing of that contract?

(Deposition of Ben. F. Wells.)

“A. Well, no, I didn’t. We have engineers, and they do the figuring on the job—make out the estimates.

“Q. Did you participate at all in the estimates?

“A. How do you mean? Making up the estimates?

“Q. Yes.

“A. I don’t recall whether I did on this job or not.

“Q. You don’t recall whether you did or not? A. No, I don’t.

“Q. Did you have anything to do with designating the type of equipment to be used on the job? A. Oh, yes.

“Mr. Barnett: Just a minute. Off record.

“(Short intermission.)

“Mr. Barnett: Will you read the last question?

“(Last question and answer read.)

“Q. Well, now, that was part of your job, your duty, to ascertain the nature and type, as well as quality, of equipment [145] to be used in connection with this particular job? Isn’t that true? A. Yes.

“Q. And you made agreements or contracts for the use of such equipment as, in your opinion, would do the work? Is that true?

“A. Well, most—quite a lot of the equipment was our own that we used on the job.

(Deposition of Ben. F. Wells.)

“Q. Yes.

“A. We hired some. Whatever we needed to fill up.

“Q. Yes. By ‘we’ you mean you did?

“A. Yes.

“Q. That is part of your job, isn’t it?

“A. Well, sure, it is part of my job, but it is the company.

“Q. Yes. There is no quarrel about that. As general superintendent, why, that is one of the duties you are supposed to discharge—isn’t that true, Mr. Wells?

“Mr. Schell: Just a moment. That is objected to as assuming something not in evidence—that he was general superintendent. He said he was construction superintendent.

“Mr. Barnett: I will admit that. I think you are right.

“Q. As construction superintendent of this particular job, that was part of your duty to hire such equipment as would do the work—isn’t that true? A. That is right.

“Q. All right. Now, you know Farr and Sinclair, don’t you? A. Yes, I met them.

“Q. Where did you meet them?

“A. Well, the first time I met them they come up to my apartment at 926 Powell Street.

“Q. And subsequent to that time you did enter into a contract with them for the use of four trucks?

(Deposition of Ben. F. Wells.)

“A. Well, I didn’t enter into any contract to hire any—I hired some trucks off of them, yes.

“Q. Yes. Now, getting back to the work which we described here [146] a moment ago, that was 600,000 yards of dirt to be removed?

“A. Yes.

“Q. And at the time that you first entered into the contract to remove that, did you form any estimate as to how long it would take to remove it?

“A. Well, I think maybe I might have said what—how many days it would take to move it.

“Q. And what did your estimate say at that time? A. Around 60 days.

“Q. And what length of time did it take you?

“A. Actual working time, I think it was 54 days.

“Q. And by days, how many hours do you mean?

“A. 21 hours a day we were working.

“Q. 21 hours per day. And it took you approximately 54 days of 21 hours to do that work? Is that correct?

“A. That’s right.

“Q. Do you recall having a conversation with Farr and Sinclair during which the length of time it would take you to remove—to do this job was discussed?

(Deposition of Ben. F. Wells.)

“A. Well, I don’t know as I could recall it. I think that I did tell them it would take us 60 days. We were going to move 10,000—10,000 or 15,000 yards a day, and 600,000 yards would take us around 60 days to remove it.

“Q. Did you have any further conversation relative to the time that it would take you to move the dirt, other than what you have told us?

“A. None that I know of. I don’t recall.

“Q. Was there any conversation between you and these gentlemen relative to their purchasing four trucks to be used in this work?

“A. Well, they told me, after one or two visits to my place, that they were going to buy these trucks.

“Q. For this particular job? A. Yes.

“Q. And was anything said about payments on the trucks? A. Yes. [147]

“Q. Will you state the conversation, please?

“A. Well, I couldn’t recall exactly. They told me one time how much they was going to pay for these trucks—how much payment—and I told them that that was foolish, that they couldn’t make that much money out of these trucks; no trucks would make that much money—having 20 years experience in trucking myself; and I think that one particular night

(Deposition of Ben. F. Wells.)

they brought an agreement up for me to sign. As well as I recall, it was something that guaranteed to Young & Son so much payment, and I told them I couldn't sign it and I wouldn't sign it; that I didn't have any authority; that I was only construction man; that I was no officer of the company; that I knew our officers of the company wouldn't sign it anyhow. And then later on an agreement came through assigning their earnings to Young & Son.

"Q. Do you recall what that agreement stated?

"Mr. Schell: Which one are you talking about, Mr. Barnett?

"Mr. Barnett: Well, the one he just mentioned.

"A. To Young & Son?

"Q. That is right.

"A. Well, I have a copy.

"Q. That was an assignment of the——

"A. Yes, an assignment.

"Q. A consignment, as you call it, of what they might have coming, to Young & Son?

"A. Yes, sir.

"Q. And am I correct in saying that that covered payments over a period of four months?

"Mr. Schell: Just a moment. We object to that. The assignment would be the best evidence.

(Deposition of Ben. F. Wells.)

“Mr. Barnett: That is true, but if he has any recollection of it, that is what we are getting at.

“A. I have no recollection.

“Q. You have no recollection at all as to that? [148]

“A. As to the terms of that, yes.

“Q. But it is your impression now that at the time that you hired these trucks from these boys in the manner that you have indicated, you told them that they would have approximately 60 days work? Is that true?

“A. Well, I never——

“Mr. Schell: Just a moment——

“A. I never promised anything.

“Mr. Barnett: Q. Well, you told them that the job would take about 60 days—is that correct—60 days of 21 hours? A. Yes.

“Q. Now, is it true that you were paying them \$2.70 per hour per truck? Is that part of the agreement?

“A. Well, I couldn't say. I would have to look that up.

“Q. And in addition to that, the sum of \$1.43—approximately \$1.43 per hour per man for salary—is that true?

“A. You mean for drivers?

“Q. Yes.

“A. We were carrying the drivers on our payroll.

(Deposition of Ben. F. Wells.)

“Q. In other words, these men—and I refer to the plaintiffs here—were to get \$2.70 per hour per truck, and you were carrying the drivers on your payroll? Is that correct?

“A. I have to look that up. We have got a record of that.

“Mr. Barnett: Have you the record with you, Mr. Schell?

“Mr. Schell: No, I don't have the record. My own recollection is that the \$2.70 included the driver, and salary was deducted, but I am not positive.

“Mr. Barnett: No, I think that was in addition.

“Q. Have you any memory at all on the subject, Mr. Wells?

“A. Well, I think that was something that we—we paid the drivers. I don't know whether that was deducted or not, but I [149] have a record. I haven't brought it along. And then the gas and oil, we furnished that and deducted that from their earnings.

“Q. Now, how long did these men furnish these trucks for that work?

“A. Well, I think I looked on the record—they worked around 17 days; they were there 17 days—part days and some full days.

“Q. And by that you mean the two men, Farr and Sinclair, plus the drivers?

“A. Well, I wouldn't say that they were

(Deposition of Ben. F. Wells.)

there, but the trucks were there. It shows on our record from the time they started working till they quit working was, actual days, 17 days. I think they were around in the neighborhood of two months.

“Q. Have they received any money for that work? A. None that I know of.

“Q. Have you a record of how much is due on it, if anything? A. Yes.

“Q. Do you know what that is?

“A. Oh, that record shows—well, I couldn’t go into details on that. That is in the office.

“Q. It is your recollection now that they worked for how many days? 17 days?

“A. Something like 17 days.

“Q. How long did it take to finish the job?

“A. Well, we worked 54 days on the job.

“Q. Now, at the time that you started, do you recall how many trucks you had in operation on the job?

“A. Oh, I think maybe the first day we had 10 or 12 or 14—something like that—but as we would go along we had up as high as 28 or 29 trucks.

“Q. Now, of the total amount that you had on the job, how many belonged to you?

“A. At what time on the job?

“Q. The start of the job?

“A. I don’t think we had any of [150] our own at the start of the job.

(Deposition of Ben. F. Wells.)

“Q. During the course of the job did you have any of your own trucks? A. Yes.

“Q. Was there any particular reason why you didn't have any of your trucks on the job at the start of the job?

“A. They were busy on another job.

“Q. And when were they released from this other job? A. I couldn't say.

“Q. Would you say it was at or about the time that Farr and Sinclair were withdrawn from the job?

“A. It was somewhere in the neighborhood.

“Q. About that time?

“A. Offhand, yes.

“Q. And so whatever work they were doing was then done by trucks that were released from some other job—is that correct?

“A. Well, I couldn't say definitely.

“Q. Mr. Wells, let me ask you this: Was that the reason why you released them from further work on the job. A. No.

“Q. What was the reason?

“A. Because their trucks wouldn't stand up and they couldn't keep them running; maybe have one out of four running.

“Q. Did you pay them for one out of four?

“A. We paid them on the actual time they worked.

“Q. And if a truck was not running, why, of course, it wouldn't be paid for?

(Deposition of Ben. F. Wells.)

“A. No, sir.

“Q. So the fact that some of your trucks—by ‘your’ I mean Macco Construction Company—were available for work after the job commenced had nothing to do with releasing the four trucks they had in operation?

“A. No.

“Q. Is that true? A. That is right.

“Q. And your reason for releasing them was what?

“A. Their [151] trucks weren’t mechanically in condition to keep running.

“Q. Was that the sole reason?

“A. I will say that was the main reason.

“Q. Was there any other reason?

“A. Well, there was on the minor details of different things—that we couldn’t keep drivers on them.

“Q. Anything else?

“A. We couldn’t keep an organization. We would go out with so many trucks in the morning, and in an hour or so they would be broke down and our shovels would be standing waiting.

“Q. When did that occur? How many days after they started to work?

“A. Well, I wouldn’t definitely say. The boys—the trucks weren’t in shape to work.

“Q. Was that the case from the first day on?

(Deposition of Ben. F. Wells.)

“A. Practically from the first day on.

“Q. In other words, from the first day they started to work, for 17 days they were in condition to run?

“A. Well, I would say maybe the first day. They had trouble, of course, naturally; you would expect some trouble, but not so much as they had. I think they expected it themselves.

“Q. Is there any other reason that you can give why they were let out?

“A. Well, that was the main reason why.

“Q. That you couldn't keep drivers on, and you couldn't maintain an organization—is that true?

“A. That is right, and because of trucks breaking down.

“Q. Those were the two main reasons, and the fact that you had your own trucks available had nothing to do with it?

“A. Not a great deal, no. We told them ahead of time, a week or so, that we was going to have to let them go.

“Q. And did you give any reason at that time? [152]

“A. Well, they knew the reason. We didn't have to tell them.

“Q. Well, it is not what you might have thought they knew, but did you tell them anything, Mr. Wells?

(Deposition of Ben. F. Wells.)

“A. No, I didn’t tell them.

“Q. And what type of trucks were they?

“A. Well, they were Autocar dump trucks.

“Q. About how many tons?

“A. Oh, I suppose about a 10 or 12 ton truck. They would handle 10 ton, I would say.

“Q. What kind of trucks did you replace them with?

“A. Well, we have various—different types of trucks, bigger trucks and better trucks.

“Q. By ‘we’ you mean your own trucks?

“A. Our own company, yes.

“Q. And about how many tons were they?

“A. Oh, about 16 tons.

“Q. And where did those trucks come from? From what job?

“A. From San Diego.

“Q. Did you drive them up here?

“A. Yes, sir.

“Q. As I understand it, they were not available when this job first started?

“A. No, they were working on other jobs.

“Q. Now, at the time that you hired these trucks, Mr. Wells, your conversation was that the job would take about 60 days?

“A. Well, now, I don’t think there was any conversation much about it. They just wanted to know how long it would take, and I said around 60 days.

“Q. And, as a matter of fact, it took approximately 54 or 55 days—is that true?

(Deposition of Ben. F. Wells.)

“A. 54 days, yes, sir.

“Q. Do you recall that there was anything in the agreement or contract between Bethlehem and your company as to the length of time the contract was to go?

“A. I couldn't say.

“Q. Have you any recollection on that subject? A. No. [153]

“Q. You have knowledge, however, that these boys bought the four trucks for this job, though, haven't you?

“Mr. Schell: Just a moment——

“Mr. Barnett: I will withdraw it.

“Q. Have you any knowledge that they bought the four trucks for this job?

“Mr. Schell: At the present time he is dealing with now.

“A. Yes—not when I hired them. They told me that they were going to buy them. When they first contacted me, I had no knowledge of them buying trucks. I thought they owned them themselves.

“Mr. Barnett: Q. And subsequently and during the time of the job you acquired that knowledge—is that correct? A. Yes.

“Q. It was about January 18th when they stopped work—isn't that true?

“A. Well, I couldn't say.

“Q. Do you know when you completed the job—what date? A. No.

(Deposition of Ben. F. Wells.)

“Q. At any time did you have any knowledge that these trucks were purchased from Young & Son in Berkeley?

“A. Yes, they told me; the boys told me.

“Q. And when was that?

“A. Well, that was just before they brought them on the job.

“Q. Did you know that—I will withdraw that. Just before the first day that they started to work?

“A. Well, when they brought that guaranty to me, that is when I realized where the trucks had come from.

“Q. And that was on or about the 3rd of December—isn't that true?

“A. Well, I couldn't say.

“Q. You don't recall having any conversation with anybody regarding the duration of this contract with Farr and Sinclair?

“Mr. Schell: Other than what he has stated.
[154]

“Mr. Barnett: Q. Yes, other than what you have said?

“A. Yes, other than what I have stated.

“Q. Do you recall having a conversation with a representative of Young & Son? Do you recall telling them or him that in your opinion this job would take about four months?

“A. No.

“Mr. Schell: Just a minute. That is ob-

(Deposition of Ben. F. Wells.)

jected to as very vague and calling for the conclusion of the man who was representative of Yonug & Son. Your question is vague, but he doesn't remember whether he ever had a conversation——

“Mr. Barnett: Well, he has answered no. This is cross examination, and the record will show, under our previous stipulation, that this is taken pursuant to 2055, and that it was intended as that.

“Q. You don't recall having such a conversation? A. With who?

“Q. With the representative of Young & Son? A. At what time?

“Q. Did you on or about December 3rd, 1940? A. No, sir.

“Q. Did you have any conversation at any time with a representative of Young & Son?

“A. Someone—I think it was their attorney—called us one time in regard to how much money they had coming, and that was after the trucks weren't working.

“Q. After the trucks quit working?

“A. The trucks weren't working for us any more.

“Q. So that, as you recall, neither prior to the time that they started to work nor at or about the time they started—to-wit, on December 3rd—did you have any conversation with anybody regarding the duration of the work that Farr and Sinclair had with you?

(Deposition of Ben. F. Wells.)

“A. No, sir.

“Q. You never had any conversation other than what you have told us?

“A. None that I know of.

“Q. Then is it true that your agreement with them was that they [155] were to work for you as long as you wanted them to work?

“A. That is true. We hired them as we have always hired trucks like that.

“Q. And by ‘we’——

“A. The company, yes.

“Q. In other words, there wasn’t any definite period of time to that agreement?

“A. No, sir.

“Q. The reason you let them go was that they didn’t have—they couldn’t keep drivers and they were undependable as far as the equipment was concerned? Is that true?

“A. That was the main reason for letting them go.

“Q. You say that your title is that of construction superintendent—not general superintendent? A. No.

“Q. Who is the general superintendent?

“A. Well, Mr. Davis would be rated the general superintendent out of the Los Angeles division. He had charge of everything. He is also vice-president.

“Q. Who is the general superintendent of this division?

(Deposition of Ben. F. Wells.)

“A. Well, I am superintendent out here, in charge of the jobs.

“Q. Yes. In other words, you are the head man of this division—isn't that true, Mr. Wells?

“A. Yes, to a certain extent. Mr. Davis is over me.

“Q. Yes.

“A. And Mr. McLeod (McCloud) also.

“Q. Yes, but usually you would let the contracts, would you not?

“A. Well, if it is anything that amounts to something I always take it up with my superiors before I do anything.

“Q. Now, were you consulted prior to the time that your company bid on this job?

“A. Was I consulted?

“Q. Yes.

“A. I was here in town when we took this job, and looked at it, but when the job was bid I wasn't here.

“Q. Did you see any figures?

“A. Well, not, because we [156] only talked about it and discussed it, and I went back over—I was on the other side of the mountains building a dam, and I left town.

“Q. Was there any time placed on your bid as to when the job could be completed?

“A. I couldn't say. I have never seen the contract.

(Deposition of Ben F. Wells.)

“Q. Have you any recollection as to whether or not there was a time element in it?

“Mr. Schell: He just answered he has never seen the contract.

“Mr. Barnett: That is all right. He might have knowledge without seeing the contract.

“A. I wouldn't know.

“Q. So that the first day you had approximately 17 trucks in operation?

“A. I wouldn't say—we had two shovels, and there was 12 or 14 or 17 trucks, maybe, on the job. I couldn't say. I would have to look up the record for that.

“Q. Well, where are those records?

“A. We have them in our office here in San Francisco.

“Q. And where is your office located?

“A. 776 Folsom.

“Q. And after the first week how many trucks did you have in operation?

“A. Well, that's hard to say. Our haul increased; we had a longer haul. We added more trucks, and we added another shovel.

“Q. Well, can you tell us the minimum and maximum amount of trucks and shovels you had during the job?

“A. Well, there was three shovels, and I think at one time we had—oh, I couldn't say—either 29 or 30 or some trucks—something like that—at work any time from, maybe—I don't know—the first day maybe it was a

(Deposition of Ben F. Wells.)

small number of trucks, [157] but I think we had up as high as around 29 or 30 trucks at one time. I couldn't say.

“Q. Was there any bonus given to you, or was there any penalty imposed, for finishing the job either earlier or later—a penalty if you finished it later than the designated time.

“A. Well, I couldn't say that. I have never seen the contract.

“Q. Of course, it was your idea to put on good equipment and to finish the job as soon as possible?

“A. The Navy was in a hurry. That is all I know.

“Mr. Barnett: That is all.

“Examination

By Mr. Schell:

“Mr. Schell: Q. At the end of the job, Mr. Wells, you just had a few trucks working?

“A. Yes.

“Q. The last two weeks?

“A. I think we had seven—I think seven or eight trucks the last three weeks, I guess.

“Q. That was just clean-up?

“A. Clean-up.

“Mr. Schell: That is all.

“Examination

By Mr. Barnett:

“Mr. Barnett: Q. Well, that is usual, isn't it?

(Deposition of Ben F. Wells.)

“A. Yes. We shipped out some shovels; in fact, we moved all three big shovels off before we were done, and used a smaller shovel to finish up.

“Q. Yes. Well, that is general clean-up work. How long did that take you?

“A. Well, the first shovel went out almost a month before we were done; and another one went out the following week, and we were working down to one shovel at the final—at the end.

“Q. Yes. And the most trucks you had was 29, you say?

“A. I wouldn't say positively, but it was up in that neighborhood.

“Mr. Barnett: Approximately. All right, that is all.” [158]

Then it is signed, subscribed and sworn to.

With that the defendant rests, your Honor. We wanted to have the jury examine that exhibit.

The Court: Which exhibit?

Mr. Schell: The tabulation of the various costs and expenses that went in in lieu of some of the testimony of Mr. Tucker.

The Court: Yes, it can be shown to the jury sometime; I assume it will be all right during argument?

Mr. Schell: Yes, that is all right.

Mr. Barnett: Your Honor, I wanted it distinctly

understood that my stipulation did not cover that as an exhibit except for a limited purpose, that the witness would testify to what appeared on that sheet.

The Court: I think the jury understands what this sheet was introduced for. Any rebuttal?

Mr. Barnett: Your Honor, I think I have one or two questions to ask, but I don't know what your Honor's custom is as to recesses, and we have been here since 2 o'clock, and frankly, I could stand a recess.

The Court: I would like to clean up the case and let the jury go.

Mr. Barnett: The rebuttal will be very short. I would like to have it at the next session.

The Court: No, I would rather not.

Mr. Barnett: It will be Mr. Sinclair, your Honor, and this will be quite an ordeal, and I would rather have it at the next session.

The Court: I would rather not.

Mr. Barnett: Judge, you certainly work lawyers. [159]

The Court: Well, I don't spare myself.

Mr. Barnett: There is a lot more to you, though.

The Court: Would any of the jurors like a recess before we start in on this? How long do you think it will take?

Mr. Barnett: Just two or three questions, but your Honor will observe what I have to contend with.

The Court: No.

ROBERT SINCLAIR,

Called for the Plaintiffs; previously sworn.

Mr. Barnett: Q. Mr. Sinclair, Mr. Tucker mentioned something about a conversation you had with him in which the name of Eaton & Smith was mentioned, and he stated that he had two such conversations. Do you recall such conversations?

A. (Writing): I recall at the time he fired us he asked why we didn't try and get the trucks on with Eaton & Smith.

(Answer read by Mr. Barnett.)

Q. Did you ever have such a conversation with Mr. Tucker prior to the time that he fired you?

A. No, sir.

Q. Did you ever have a conversation with anybody prior to the time that he fired you regarding Eaton & Smith?

A. No, sir.

Q. And I refer to the defendants?

A. No, sir.

Q. At the time that this contract was originally entered into, did you have any conversation relative to where the work was to be done, and I refer to the Bethlehem Steel Company property?

A. Yes.

Q. With whom, and what was said?

A. (Writing): Mr. Wells said the whole job was to be on private property at the Bethlehem Company. He said they were going to put the dirt on barges and take it to Alameda. [160]

(Answer read by Mr. Barnett.)

(Testimony of Robert Sinclair.)

Q. Did you ever have any conversation with Mr. Tucker, or did you ever stop him on the job and have a conversation with him in which you asked him how much longer you were to last?

A. No, sir.

Q. Did you ever have a conversation with Mr. Burch, the foreman, in which the subject of how much longer you were to last on the job took place?

A. No, sir.

Mr. Barnett: Well, I will withdraw that.

Q. Do you remember having a conversation with Mr. Burch relative to the duration of the job?

A. No, sir.

Q. Did you have any conversation with Mr. Burch touching upon this equipment, the condition of your equipment—withdraw that. Did you ever have any conversation with Mr. Burch regarding the condition of your equipment?

A. Probably.

Q. Do you recall when and where?

A. (Writing): We saw him all the time. I remember he said to get cab shields on the trucks.

Q. Did he at any time refuse to send out—withdraw that. Did he at any time state to you that he refused to send you out on a shift because your equipment was not fit? A. No, sir.

Mr. Barnett: That is all, your Honor.

Cross Examination

Mr. Schell: Q. Mr. Sinclair, have you discussed your testimony with anybody since 3 o'clock this afternoon? A. (Writing): Mr. Barnett.

(Testimony of Robert Sinclair.)

Q. You had your deposition taken some time ago, did you not, Mr. Sinclair? A. Yes, sir.

Q. You were asked in that deposition for all of the conversa- [161] tions you had with Mr. Wells on the subject of this hauling?

A. (Writing): I do not know.

(Answer read by Mr. Schell.)

Q. It is your recollection that you have never testified until now anything about any conversation with Mr. Wells to the effect that all of the hauling would be on private property?

Mr. Barnett: Your Honor, I will submit that is argumentative.

The Court: He may answer.

Mr. Barnett: If he recalls.

A. (Writing): I don't recall.

(Answer read by Mr. Schell.)

Mr. Schell: Q. You don't recall ever having testified to that effect before, do you?

A. No, I don't.

Q. When you say you discussed your testimony with Mr. Barnett after 3 o'clock, was that the subject matter of discussion, this hauling on private property? A. No, sir.

Q. It was part of that discussion?

A. No, sir.

Mr. Schell: That is all.

Mr. Barnett: That is all, your Honor. I think that is all, your Honor.

The Court: Ladies and gentlemen of the jury, I don't want to work you too hard, but we have an opportunity to finish this case up tomorrow. After the arguments, which I understand will not be of great length, and the instructions, then I shall give the case to you for your consideration. Or if it is much more convenient to everyone, I will put it over until Monday, but I assume you would rather finish the case entirely tomorrow.

A Juror: I have a case coming up on Monday, in which I have to be a witness. Saturday will be all right with me. [162]

The Court: Apparently the majority of the jury feel that Saturday would be better. Would you like to start earlier or later? Normally, we would start at 10 o'clock. If there is no expression of opinion on that, I will start at 10 o'clock, but if you would rather start earlier I will start an hour earlier.

You have now heard all the evidence in the case, so it is particularly important that you shall not discuss it amongst yourselves or remain in the presence of other persons who might discuss the case with you until it is finally submitted to you tomorrow morning by the Court for your deliberations. You may now retire, and return here tomorrow morning at 10 o'clock.

(Thereupon an adjournment was taken until 10 o'clock A. M., Saturday, March 7th, 1942.)

[163]

Saturday, March 7th, 1942

10 o'clock A. M.

The Court; Proceed.

Mr. Barnett: Plaintiff is ready, your Honor.

Mr. Schell: Defendant ready, your Honor. At this time, if the Court please, on behalf of the defendant Ben F. Wells, I move this Court for a directed verdict in favor of said defendant on the ground that under any interpretation of the evidence, or for that matter, the pleadings, Mr. Wells was merely acting as an agent for a disclosed principal, and so whatever he did, there would be no personal liability on Mr. Wells for any amount of money due the plaintiffs, if there is anything due.

(Argument by Mr. Schell on motion.)

The Court: I deny the motion.

Mr. Schell: At this time on behalf of the defendant Macco Construction Company and the defendant Ben F. Wells, and each of them, we move the Court for a directed verdict in favor of the defendants, and each of them; first, on the ground that the evidence fails to establish a valid contract or any contract entered into by and between the plaintiff and the defendants, or either of them, for any particular time:

That the evidence affirmatively shows that the plaintiff had no capacity to contract or engage in the business of transportation of property for hire. That is in connection with the carrier act;

That the evidence fails to show that the defen-

dants, or either of them, wrongfully breached any contract, and plaintiffs have failed to show that they sustained any damages.

In connection with this motion, I will urge the further [164] ground that it affirmatively appears from the evidence that in the event there was no contract for any definite period of time that contract was a novation.

We urge the further ground that in the event the original contract contemplated hauling over private property that without the showing of any duress or fraud or oppression or anything else, the parties varied no terms of that agreement, and that constituted a novation; and in view of the undisputed evidence that plaintiffs were not in the position to carry out the terms of the contract we believe that their cause of action has failed.

(Argument on motion.)

The Court: Motion denied; exception allowed.

Mr. Barnett: Shall I commence the argument, your Honor?

The Court: Yes.

(Arguments to the jury by respective counsel.)

The Court: Now, ladies and gentlemen of the jury, it is lunch time. Do you want to go to lunch before I instruct you?

A Juror: Stay with it.

The Court: I will give you a short recess. Court is in recess.

(Recess.)

The Court: Now, ladies and gentlemen of the jury, you have heard all of the evidence in the case of Farr and Sinclair, as plaintiffs, against the Macco Construction Company and Ben F. Wells, the defendants.

It is now my privilege and my duty to tell you what the rules of law are that you are to apply in determining what are the facts in this case. You will have with you in your jury room the pleadings in the case; that is, the written documents upon which the respective claims of the parties are based. I [165] will try to outline for you what are the questions between counsel and suggest to you the rules of law which you are to apply. Now, there are a good many things that come into a trial of a case that are not evidence. Counsel have a right to make arguments before you, and one represents one side and the other the other side. Naturally, since they are hired to try the case they take a partisan viewpoint from a standpoint of their own clients. They are here to win the case. That is what they are here for. While counsel have a right to argue that viewpoint, that is not evidence. You have to get your facts from the documents in the case, and from what the witnesses testified to. Likewise, you have the written documents on what they call the pleadings, the complaint and answer in this case; but those are not evidence either, although it is true that any fact which any party admits does not require proof. You can, of course, accept any argument counsel makes to you which you think is sound

and reasonable, but the viewpoint depends on yourself and not on what counsel says.

Likewise, the Judge in the Federal Court has the right to comment on the evidence and tell you what he believes the determination of the case, or discuss the credibility of any witness. But this is a simple case, and therefore, I shall not exercise my power or responsibility to tell you what I think about this case. I will further state to you that if any of you know by any expression of mine how I think the case should be determined, that you are not bound by that at all. You are the sole judges of the facts of the case, and you have the responsibility to determine them correctly under the rules of law. Your responsibility is a heavy one; much heavier than mine, because there is no way of appealing from the determina- [166] tion on a question of fact. That is final and binding on everybody.

This is a civil case, and is based upon a complaint, which is a claim made by the plaintiffs, Farr and Sinclair, that they have been damaged in some respect by the Macco Construction Company and Mr. Wells. I have not taken Mr. Wells out of the case so far, but I say to you now, that as far as I can judge from the evidence, there is no claim that Mr. Wells is directly responsible personally for this contract. The plaintiff doesn't claim that he entered into a contract on his own account, and the defendant doesn't believe that either. The contention is that Mr. Wells was the agent of the Macco Construction Company, and entered into a contract for them. He could only

enter into a contract for them so far as he was their agent and in so far as his authority carried him. The question of authority is before you by sizing up the contention of both parties. I don't think that there is any basis in this case under which you could give a judgment against Mr. Wells. I think that any judgment that you would give, you would give against the Macco Construction Company. While I don't mean directly, as a matter of law, to say that you cannot give a verdict against Mr. Wells, I say that as the facts in the case shape up that it is my opinion that he is not liable. So, therefore, I would suggest that you return a verdict against the Macco Construction Company, if against anyone.

That is the next question I will now take up. I say, even in that regard, you are not bound by what I say or bound to follow that comment if you thought he would be liable under the facts and the law as I now give it to you.

The next thing in the case is this: That is, the ques- [167] tion of the amount that is earned, that these people actually earned on the job is in controversy. Defendant Macco Construction Company says that they have earned a certain amount, and the plaintiffs, as stated, say if there is no express contract, that that is true, but that amount represents the amount that they actually earned for the labor they did, if there was no express contract as claimed by the plaintiffs.

So, then, we now approach the matter of conflict

between these two parties. The plaintiff says it is claimed that on or about the 3rd day of December, 1940, defendants and plaintiffs entered into an oral agreement in the City and County of San Francisco, State of California, wherein and whereby plaintiffs agreed to furnish four auto trucks and the personal services of the plaintiffs; that is, Farr and Sinclair, in the operation of the same; and the defendants agreed to hire the exclusive personal services of said plaintiffs and the equipment for the entire duration of that certain grading and excavation project of the defendants situated in the City and County of San Francisco; and that the period contracted for, as aforesaid, was and is approximately four months.

Now, the defendant Macco Construction Company—because I am *discuss* them—on the other hand said that that agreement was not for the hiring of trucks or any truck, or any personal services for the entire duration of the grading and excavation project of the defendant; but on the contrary, Macco Construction Company says that the agreement was that the plaintiffs Farr and Sinclair would furnish and maintain the four auto trucks in good, safe, serviceable, workable condition, and the personal services to be rendered in the operation therefor for such time as the Macco Construction should desire to avail themselves thereof in [168] connection with the grading and excavation project of the defendant, and for no other purpose or longer period of time.

So there you see what the issue is. Everybody admits there is a contract. The question is, what was the contract? The contract was for the hiring of these trucks and the personal services of Farr and Sinclair in the operation thereof, without question, but the parties disagree as to whether that was to last for any particular time. Plaintiff claims the contract was for four months, the duration of the Bethlehem job; and the defendant, on the other hand, says, "No, we didn't have that term of contract; it was simply to do that, and when we were ready to get rid of Farr and Sinclair, why, we could."

Now, there are other terms of the contract which are admitted. The defendant admits that it agreed to pay Farr and Sinclair as and for compensation for their services and for the use of such equipment \$2.70 per hour per truck while the truck was in condition to be operated and was being operated for the benefit of Macco Construction Company; and in addition thereto, the sum of \$1.42851 cents per hour on account of the payment of the salary of the drivers of each of said trucks for the time during which the driver was on duty in connection with the business of the defendant. Now, in that connection there are some other things which I think are not particularly important, "On account of personal liability and property damage insurance, workmen's compensation insurance, Federal old age social security, gasoline and oil furnished by this defendant, the time of mechanics, and the cost of parts necessary for re-

pairs to said trucks incurred by this defendant on behalf of plaintiffs, time during which the drivers of said trucks were not actually engaged in the business of performing services of this defendant due [169] to the condition of said trucks and other items of cost and expense reasonably incurred by this defendant on behalf of plaintiffs in connection with the operation of said truck equipment."

That simply means that the defendant was not going to pay the plaintiff until it deducted the things it had to pay on plaintiff's account. So I don't think that is particularly in controversy between the parties.

But the facts of the controversy are these; as to whether or not this particular term as to "duration" is included in this contract in the first instance; and the controversy about the reasonable condition of the trucks to perform the job. It would be implied that the equipment furnished would be reasonably capable of performing the work, because obviously no one would expect a person to contract for equipment that couldn't perform the work; that is one of plaintiff's responsibilities.

Now, there has been a controversy arisen over this, and the plaintiff has come into court asking for damages because of the fact that this controversy has not been settled to their satisfaction. Under those circumstances, the plaintiffs have the burden of proving all of the matters which plaintiffs set up. In other words, plaintiffs have the burden of proving, in the

first instance, that there was a contract as they allege containing this term as to duration, and they must prove that by a preponderance of evidence.

Preponderance of evidence sounds like a mysterious term, but it is not. Preponderance of evidence simply means the greater weight. That does not mean the greater number of witnesses; it simply means the plaintiffs must prove their contention regarding this contract by evidence which is more convincing [170] to you taking it as a whole, than that which has been produced by the defendants.

In the event you find this term of contract was included, and there was an express agreement to that effect, then you will consider the other question in this case. If you find that the plaintiffs have failed to prove that this term was included in the contract, you will then go no further in the case, but determine for the defendants.

Now, in determining whether the contract was one that the plaintiffs contend it was, or what the defendants contend it was, you should carefully consider all the evidence that you have heard surrounding the entering into the contract, and particularly the language used, because in the formation of a contract there must be always a meeting of the minds of the parties as expressed between them. So, therefore, the language used by the parties at the time it is claimed that an oral contract was entered into must always be of great importance in determining whether the contract was of one type or another. Therefore, you will very carefully consider what

was said between these respective parties at the time it is claimed this contract was entered into.

There are also other matters which you may consider. You may consider this question about the things that the plaintiffs did after or about the time that they were getting ready to enter into this contract. One of the things is the purchase on the conditional sale contract of these trucks. You may consider that fact or give it the weight you believe it to have in determining what plaintiffs were attempting to express in the contract. They must have expressed it; otherwise the contract would be as I say. You may consider this conditional sale contract in [171] determining what the parties meant by what they said.

You may also consider this document that has been called a "guaranty" given by Mr. Wells for the Macco Construction Company regarding payments that he would make to Young & Son on the conditional sale contract during the time that Farr and Sinclair were working. Now, it is necessary for me to construe that document for you. I say to you that that guaranty is a promise upon the part of Macco Construction Company to pay to Young & Son, Incorporated, that amount of money that Farr and Sinclair earned, and nothing else. They were not obligated to pay any more. It is true that there is a specification of so much per month for these four months; but they are not obligated to pay a cent more than Farr and Sinclair earned on this contract. I am not saying that because I am interpreting a

written document that I am saying what implication you should draw from that as to the existence of this oral contract with which you are particularly concerned. But that is the interpretation of the contract that was signed by Farr and Sinclair and Young & Son, and accepted by Mr. Wells for the Macco Construction Company.

Likewise, there has been some comment upon the fact that the evidence does show that at the time that they were told that they were through, that is, Farr and Sinclair were told that they were through, that they made no comment, and apparently took what the record showed at that time. You may consider that in determining whether there was a contract, in the first instance, or not; but even if they had a contract, they could do just exactly the same thing and still may be liable if there was a contract for the duration. They don't have to say, "Well, we are going to sue you," or, "We have a contract, and we are going to stand on it." If they had a contract, they would [172] have to stand on it, as far as that goes. The admitted part of it is that at the time when they were put off the job, they did look at the record and indicated that so far as the record was concerned that it was correct in so far as what they earned. Therefore, you may take into consideration the determination of whether there was a contract or not, but it is not conclusive one way or the other. Now, the defendant Macco Construction Company also has an-

other viewpoint. They say that there was a term, either express or implied, that these trucks when they first came on the job would be reasonably in condition to do the work expected of them. They say that because the evidence shows that the first day the trucks didn't work a great length of time and that there was afterwards work done upon them to fit them out better—and you have heard both sides on what that work was—that the defendant told these men through one of its agents that they were through. In other words, that if there was an expressed contract at that time, that the defendant takes the viewpoint that it then said, “We declare this contract off;” and that the plaintiffs agreed to it by saying, “Well, could we do something to get back on the job?” If the parties at that time agreed upon the oral contract by mutual consent, they could do that without liability on either side, and thereafter they could enter into a new contract. This is what defendant claims. However, that is a question of fact which you must determine as to whether the defendant did abrogate the contract with the consent of the plaintiffs at the time the plaintiffs first came on the job on the 9th day of December, and thereafter made a new arrangement with them whereby they were hired day by day.

If you find that the plaintiffs' contention was established [173] that there was a contract of four months duration, and that was not abrogated, according to defendants' contention, but existed from

that time on up until the 17th day of January, I think it was—at any event, the date when the plaintiffs were told finally that they were through—then you have to determine who breached the contract. If the defendant, when such contract was in effect, arbitrarily, without legal excuse—and I will define that in a moment—told the plaintiffs to leave, then that was a breach of contract, if you find that there was a contract for that duration of time. Then, if the defendants put them off the job and told them they couldn't work any more, then that constitutes a breach of contract and there is not any legal excuse for the breach of contract. Defendants claim that plaintiffs failed to carry out the contract, and defendants claim that that breach was accomplished in this way, that the plaintiffs' equipment was not reasonably fit to carry on the work that they knew they were required to turn over and accomplish. Now, the defendants would be required to establish those conditions affirmatively, and that is by a preponderance of evidence to show they had a legal excuse for letting them go. If you find, in the first place, there was a contract which plaintiffs claimed did exist, and that the terms of the contract implied fitness of equipment to do the job, and on that day and before that time the plaintiffs had broken the contract by not having the equipment in reasonable shape to carry on, then you may determine that the defendants properly exercised **their right** to declare that the plaintiffs were in default of

the contract. If the defendant did that under those circumstances they would not be liable for anything. On the other hand, if the equipment was reasonably sufficient for the work on the job, and you so [174] find, and find that the defendants without any proper excuse of that sort broke the contract itself by putting these people off the job, then you may consider the question of damages.

Now, in determining the question of damages, I will give you instructions on them. At this point, however, I am not indicating that you shall find them. It is for you to determine, first, whether or not the defendants are liable. But, at any rate, if you come to the question of damages, then plaintiffs would be entitled to recover whatever would reasonably compensate them for the wrongful breach. In determining what sum that would be, why, you would have the right to take into consideration all of the expenses that they had been put to, if you find that there were any acquired under the contract in putting these trucks in shape and the expenses, if any, in acquiring the trucks, the expenses in preparing them by getting licenses, or whatever is in the evidence. I do not say that is one of the features, because I don't know whether that is in the evidence, but anything which was necessary to prepare the trucks for the job. Likewise, the loss, if any, the actual loss of any time that the plaintiffs may have suffered. You have the right also to give them any profits that you find they would have *arned*. Now,

you cannot speculate on that. Ladies and gentlemen, it is not a basis for speculation, but you must have evidence that they would have *arned* under the terms of the contract a certain profit and assess that profit in considering and arriving at damages. I shall not go into the features of whether there was a profit or not. You heard the evidence on that. You heard both sides, who presented two schedules; one, claiming there was a substantial profit that would be earned, and the other, showing that the operation would be carried [175] on at a loss. But that is a pure question of fact, which is submitted for your determination.

You are the sole judges of the fact in the case and of credibility of all of the witnesses. Your power of judging the effect or value of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to find a verdict in conformity with the declaration of any number of witnesses whose testimony does not produce conviction in your minds, or against the testimony of one witness *who* testimony does impress you as being true, and does produce conviction in your minds. The testimony of any one witness to a fact in this case is sufficient if it produces conviction in your minds to establish that fact.

Every witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, the character of

his testimony, or by evidence affecting his character or motives, or by contradictory evidence. If you find that a witness has testified falsely in part of his testimony, you may look with distrust upon the other evidence given by the witness. If you find that any witness has testified wilfully falsely, you are at liberty to disregard all his testimony unless corroborated by other evidence which you do believe.

Any fact in the case may be proved by direct evidence. Direct evidence is the proof of a fact by an eye witness or a person who was present and who observed that which he testifies to. Indirect evidence is the proof of other facts surrounding the fact in issue which afford an inference or presumption of its existence, but do not directly prove its existence. [176]

You have had some testimony here by deposition. A witness on a deposition is just the same as a witness who has been brought into court. Therefore, you will weigh the testimony of the person who gives the deposition in exactly the same way as you would the testimony of the witness on the stand.

Any evidence that has been received of an act or omission or declaration of a party unfavorable to his own interest should be considered and weighed by you as other evidence; but evidence or oral admission of a party other than his own testimony in the trial should be viewed by you with caution. That instruction relates to parties and witnesses on both sides.

Both the parties have been heard by oral evidence, and two forms of verdict have been prepared for you.

In accordance with the rules of civil procedure, I will allow the jury to retire for a few minutes, gentlemen, if you wish to make any exceptions to the instructions of the Court.

Mr. Schell: I desire that, your Honor.

The Court: Ladies and gentlemen of the jury, you may now retire for a few minutes while we take up a question of law with the attorneys. At the conclusion of that you will be called into Court, and you will be permitted to retire for consideration of your verdict.

Now, gentlemen.

Mr. Barnett: No objection, your Honor.

Mr. Schell: I would like to note the following exceptions, your Honor: First, to the instructions given, I believe, as to damages. I believe they are in error, in that they contemplate reimbursement for all the expenses the plaintiffs necessarily incurred in the purchase of the trucks and everything else, together with loss of profits; in other words, the capital [177] expense, as well as the loss of anticipated profits. I take it that under the evidence, the jury is entitled to believe that plaintiffs would have made no profits during the entire process or period of this four months. Let us concede there was a four months contract for the purpose of this only, and during that four months they would not have made any profits, but would have

operated at a loss. Then they would not be entitled to the return of capital. That generally expresses my objection.

The Court: I think you are correct about that. I think possibly the instruction could carry that implication. I think I will just caution them in that regard, that they cannot award for recovery for capital outlay.

Mr. Schell: I believe, however, not to create the wrong impression now, that you just instruct them on that one thing, and that does not mean they should or should not find.

The other exception I have is that one that we have argued before, that they must have been ready, willing and able to operate beforehand, and have a permit to so operate.

The Court: Yes, you may have that exception. Call back the jury.

(Jury returns to the court room.)

The Court: Ladies and gentlemen of the jury, my attention has been called to one matter in instructing you regarding the recovery of damages. Because I give you instructions on damages does not mean that I think you have to find them, but in instructing you on damages I say that if you find for plaintiffs, then you are entitled to give such damages as would reasonably compensate the plaintiffs for whatever loss or damage they have suffered. Now, I did after that give you two phases of the matter which you might consider, and these are, first, the out- [178] lay, and second, the profit. Obviously you wouldn't duplicate the

damages in considering that. If you give damages for outlay you should not also include that element in assessing profits. You can see if damages were given for capital outlay, then in assessing profits you should take that into consideration.

I just take that up in order that you should have no difficulty in your deliberations. You might have thought the other instruction was possibly confusing.

You will have with you in the jury room the pleadings in the case, and the exhibits and two forms of verdict. In the event that you find that the plaintiff is entitled to recover, then you will fill out the form of verdict, "We, the jury, find in favor of the plaintiffs and against the defendants, and assess damages in the sum of blank dollars." After the defendants you will name the defendant that you find against. As I have indicated before, in my opinion the Macco Construction Company is the only one you should find against, and the blank line there you will fill in with whatever sum under the instructions that the plaintiffs would be entitled, if you find for the plaintiffs.

On the other hand, if you find that the plaintiffs are not entitled to recover you will use this form of verdict, "We, the jury, find in favor of the defendants."

In either event you will have the verdict signed by your foreman. Inasmuch as in the Federal Court the verdict must be unanimous, you will carefully check up to see that you are in unanimous agreement on whatever verdict you will return.

With that, ladies and gentlemen of the jury, you may now retire to deliberate on your verdict.

(The jury retired at 1:03 P. M., and returned at 1:43 P. M.) [179]

The Court: Ladies and gentlemen, I have a communication from you which says, "Can Young & Sons secure a deficiency judgment for \$1500 on any sum allowed the plaintiff?"

I want to say that that was not one of the issues submitted. The issue was whether there was a contract; second, if there was a breach and who was responsible for the breach; and third, the question as to damages. It is true that you have testimony before you which indicates that there is a difference between the sale price and the resale price of the trucks, which if you get to the question of damages you may possibly consider. Otherwise, you have no interest in what happened between Young & Sons and the plaintiffs.

There are many other issues in this case besides the one submitted to you, but the main issue submitted to you is what I gave you in the instructions.

The jury will now retire for further deliberation on its verdict.

(The jury retired at 1:46, and returned at 2:15 P. M.)

The Court: Ladies and gentlemen of the jury, have you arrived at a verdict?

The Foreman: We have, your Honor.

The Court: Pass it up to the Court through the bailiff.

(Verdict handed to the Court.)

The Court: Did you intend to find this verdict against both defendants, or just the one?

The Foreman: Just the one, your Honor.

The Court: I will send it back to you, and you may fill in the defendant's name.

(Document handed to the foreman and back to the Court.)

The Court: It still is in the wrong place. You will [180] have to put it in following the word "Defendant" in the middle of the verdict.

(Verdict handed to Foreman and back to the Court.)

The Court: It is not right. I will re-commit this to you, ladies and gentlemen of the jury, and return a proper verdict. Write one out. Court is in recess.

(Recess.)

The Court: Will you now pass the form of verdict to the Court through the bailiff.

(Verdict handed to the Court.)

The Court: Read the verdict, Mr. Clerk.

The Clerk: Ladies and gentlemen of the jury, harken to your verdict as it shall now stand recorded:

"We the jury, find in favor of the plaintiffs and assess the damages against the defendant Macco Construction Company in the sum of Twenty-five Hundred Dollars.

"Edward A. Nelson, Foreman."

The Court: Ladies and gentlemen of the jury, the Court thanks you for the attention you have given to the evidence in this case, and discharges you from further service until you are notified.

[Endorsed]: Filed Sep. 3, 1942. [181]

INSTRUCTIONS TO JURY REQUESTED BY
DEFENDANT MACCO CONSTRUCTION
COMPANY

Defendants' Requested Instruction No. . .

You are instructed that the laws of the State of California in force and effect at the time of the transactions involved herein provided that no carrier should engage in the business of transportation of property for compensation by motor vehicle or truck over any public highway, road or street in any city in this State, without having first obtained from the Railroad Commission of the State of California, permit authorizing such operation. By the term "carrier" is meant any person or persons engaged in the transportation of property for compensation or hire by means of a motor vehicle or truck as a business on any public highway, road or street in any city or county in the State of California.

You are therefore instructed that if you find that the plaintiffs, in entering into or performing the contract alleged in this case, engaged in the business of transportation of property for compensation by motor trucks over any such highway, road or

street, but that they did not have such permit from the said Railroad Commission, during the time involved in this litigation, then said alleged contract was illegal and void, and plaintiffs cannot recover in this action and your verdict herein must be for the defendants.

Given:

Given as modified:

Refused:

Judge [183]

Defendants' Requested Instruction No. ...

Before the plaintiffs can recover in this case upon the theory that the defendants failed to employ the use of plaintiffs' trucks for a specified period, the preponderance of the evidence must establish that the plaintiffs were, during said period, ready, able and willing to perform the obligations assumed by them under said contract, that is to say, the preponderance of the evidence must show that the plaintiffs were in a position to supply the defendants with the required number of trucks in proper and suitable condition so that said trucks could perform the work contemplated by the parties at the time the contract was entered into.

Given:

Given as modified:

Refused:

Judge

[Endorsed]: Filed Nov. 13, 1942. [184]

DEFENDANTS' EXHIBIT "A"

COST OF OPERATING FARR & SINCLAIR TRUCKS
WHILE WORKING FOR MACCO CONSTRUCTION
CO. AT BETHLEHEM STEEL CO., SAN FRANCISCO,
DECEMBER 1940 AND JANUARY 1941.

Income—per hour	2.70	
Cost of Operation	Per Hour	Total Costs
Gas—2095 gals. @ .135.....	.447	282.83
Oil and grease.....	.146	91.99
Drivers Comp.142	89.76
Non-Operating Drivers time and insur- ance161	101.30
Mechanic & Ins.	1.062	670.95
Tires093	58.99
Parts paid by Macco.....	.044	27.98
Parts—Inv. direct to Farr & Sin- clair, known bills	1.132	716.39
	<hr/> 3.227	

Net Loss per operated hour 0.527

No allowance in these costs for work performed by either Farr or Sinclair personally, nor for any money expended by them for parts, tires, nor for depreciation of truck or tires.

[Endorsed]: No. 21896-S. Defts. Exhibit No. A.
Filed March 6, 1942. Walter B. Maling, Clerk. By
J. P. Welsh, Deputy Clerk.

[Endorsed]: Filed Mar. 6, 1942. [185]

 PLAINTIFFS' EXHIBIT No. 1

CONDITIONAL SALE CONTRACT

This Agreement made and entered into this 3rd
day of December, 1940, by and between Young &

Son Co., Ltd., a corporation, hereinafter termed seller, and A. L. Farr and Robert P. Sinclair, hereinafter termed purchasers, Witnesseth:

That the seller herein hereby agrees to sell and the purchasers herein hereby agree to purchase, subject to the terms and conditions hereof, those certain used six-cylinder Autocar Trucks bearing the following engine and serial numbers:

Engine No.	Serial No.
50616	7065368
50611	7065370
50614	7065465
501684	201897

for the sum of \$3,500.00 in lawful money of the United States, payable as follows: \$875.00, or more, on or before January 4th, 1941, and \$875.00, or more, on or before the 4th day of each month thereafter until said entire purchase price has been paid in full. Purchasers also agree to pay to seller interest upon the unpaid portions of said purchase price at the rate of 6% per annum from date hereof to the date of payment, said interest to be paid on or before four (4) months from date hereof.

It Is Distinctly Understood and Agreed that purchasers are agreeing to purchase said personal property "as is" after a personal inspection thereof by purchasers, and without any warranty, express or implied, as to the age, year model, or mechanical condition of said personal property or as to any other thing. And purchasers do hereby acknowledge and agree that no representations or warranties of any kind have been made to them regarding said

personal property by seller or by anyone acting on its behalf. [186]

Purchasers agree to procure and keep in full force and effect during the life of this contract full and complete collision insurance covering said personal property, with loss, if any, payable to seller as its interests may appear and to cause to be issued and delivered to seller a certificate by the agent of the insurance company writing such insurance stating that such insurance has been secured and paid for and is in effect.

Purchasers hereby acknowlegde the receipt and delivery of all of said personal property in good condition and accept the same without warranty of any kind and agree to at all times maintain the same in good condition and repair, reasonable wear and tear thereof excepted, to properly house and protect the same against the elements, not to take the same out of the State of California without the written consent of seller and not to permit the same to be attached or not to create or permit to be created any *alien*, encumbrances, or adverse claims of any character against the same for storage, repairs, or otherwise, and that they will pay all taxes and assessments of every character levied or assessed against said property or this contract or the indebtedness and transaction represented thereby. Should said property suffer any loss, damage or injury, purchasers nevertheless agree to purchase and pay for said property in full according to the terms hereof.

Purchasers agree that any equipment, repairs or accessories placed upon said property shall become a component part thereof, title thereto shall be vested in seller and included under the terms of this agreement, and any indebtedness therefor, if paid by seller, shall be added to the unpaid deferred balance and become immediately due and payable with interest at the rate of 12% per annum.

Purchasers agree that they will neither use nor permit said property to be used for any unlawful purpose and that they will register, use, operate and control the same in accordance with all statutes, laws, ordinances and regulations relating to the registra- [187] tion, use, operation and control of motor vehicles.

Title to said property shall remain in seller until all payments herein provided for are made and all conditions hereof fully complied with, whereupon seller shall execute to purchasers a good and sufficient transfer of the title to said property and endorse and deliver to purchasers the certificates of ownership issued by the Motor Vehicle Department of the State of California covering said property.

Purchasers agree that seller may at its option accept payments of principal or interest past due, or part payments of moneys due without in any manner modifying the terms of this contract and that such acceptance shall not be construed as a waiver of any subsequent defaults on the part of purchasers.

Possession of said personal property shall give

the purchasers no title or interest therein and no rights thereto except as herein provided. In the event that the purchasers shall return the said property without the consent in writing of the seller, the latter may store the same to the order of purchasers and this contract shall remain in full force and effect.

Should the purchasers fail to make any of the payments herein provided for, or fail to perform any other of the terms or conditions hereof, in the manner or within the time herein specified, the seller or its assignee may, at its option, and without demand or notice of any kind to the purchasers either: (a) Declare all unpaid amounts immediately due and payable and sue therefor, or (b) Retake possession of said property and without notice resell the same at public or private sale and, after deducting all expenses and attorneys' fees incurred therein, credit the net proceeds thereof to the unpaid balance due, and said purchasers agree to pay to seller, or its assignee, any deficiency remaining under this contract after such sale is completed and the net proceeds applied thereon, or (c) Take immediate possession of said property, wherever the same may be found, and without liability for [188] trespass, in which event all of the rights, titles and equities of the purchasers in, to or under said property and this agreement shall forthwith cease and terminate and seller shall be forthwith released from all obligations to transfer title or possession of said property to purchasers. All sums of money theretofore

paid to seller hereunder shall be and remain the property of the seller, not as a penalty but as a compensation for the use by purchasers of said property and for the depreciation thereof. All sums then due and unpaid under the terms hereof shall be forthwith paid to seller by purchasers as further compensation for the use by purchasers of said property.

Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently, and such action shall not operate to estop or prevent the seller from pursuing any further remedy which he may have hereunder, and any repossession or retaking or sale of the property pursuant to the terms hereof shall not operate to release the purchasers until full payment has been made in cash. Purchasers hereby waive the right to remove any legal action from the court originally acquiring jurisdiction.

Purchasers agree to pay the seller any expense incurred in recovering the possession of said property or in collecting any unpaid balance of said purchase price, including reasonable attorneys' fees, which shall not be less than \$100.00.

Time is hereby declared to be of the essence of this agreement and of each and every term, covenant and condition thereof.

This agreement shall inure to the benefit of and shall apply to and bind the heirs, executors, administrators, successors and assigns or purchasers and the successors and assigns of seller.

It is understood and agreed that the seller or its assigns shall not be bound by any agreement or representations not contained [189] in this agreement, which the purchasers agree they have read and understand.

As further security for the payment of the purchase price of said property, purchasers agree to execute and deliver to seller, contemporaneously with the execution of this agreement, an assignment of \$3,500.00 of the moneys to become due and payable to purchasers from Macco Construction Company from the hauling job on the Bethlehem Steel Corporation property in San Francisco, California, the same to be payable at the rate of not less than \$875.00 per month. It is understood, however, that the acceptance of said assignment as further security shall not preclude or delay seller from exercising any of the other rights and options specified in this agreement in the event of default in the payment of any installment of said purchase price or the performance of any other term, covenant or condition of this agreement.

As an inducement and consideration for the execution of this contract by seller, purchasers hereby guarantee that they have secured a contract with Macco Construction Company for hauling at the property of Bethlehem Steel Corporation, San Francisco, California, upon which job the hereinbefore mentioned trucks are to be used and that said contract calls for the payment of \$4.50 per hour for each of said trucks and that the only deductions

which are to be made from said truck hire by Macco Construction Company are the wages of the truck drivers and the gasoline and oil furnished to purchasers by said Macco Construction Company. And purchasers hereby agree to furnish to seller monthly a statement showing the number of hours worked by each of said trucks during the preceding month.

In Witness Whereof the parties hereto have executed these [190] presents the day and year first hereinbefore written, seller by and through its President thereunto duly authorized.

YOUNG & SON CO., LTD.,

By F. E. YOUNG

President

Seller

A. L. FARR

R. P. SINCLAIR

Purchasers [191]

PLAINTIFFS' EXHIBIT No. 2

In consideration of the making of the within contract by the seller therein named, the undersigned does hereby guarantee payment of all deferred payments as specified therein, and covenants, in default of payment of any installment or performance of any requirement thereof by the purchasers to pay the full amount remaining unpaid to said seller upon demand at 599 Colusa Avenue, Berkeley, California. The liability of the undersigned shall not be affected by any compromise, settlement or any varia-

tion of the terms of said contract effected by or with the purchaser or the seller. The undersigned waives notice of acceptance of this guarantee, notices of nonpayment and nonperformance, and notices of any other kind and nature and waives the right to remove any action brought upon this guarantee from the court originally acquiring jurisdiction. It is understood and agreed, however, that, in the event that the undersigned is called upon to pay to said seller, pursuant to the provisions of this guarantee, from its own funds, any unpaid balance of the purchase price specified in said agreement, upon such payment being made, said seller shall assign and transfer to the undersigned all of its interest in and under said contract.

In Witness Whereof the undersigned has caused these presents to be executed by its officers thereunto duly authorized this ... day of December, 1940.

MACCO CONSTRUCTION
COMPANY

By

President

By

Secretary [192]

ASSIGNMENT

For a Valuable Consideration, the receipt whereof is hereby acknowledged, we do hereby assign, transfer and set over unto Young & Son Co., Ltd., a corporation, 599 Colusa Avenue, Berkeley, California,

\$3,500.00 of the first moneys to become due and payable to us from Macco Construction Company under our contract with said Macco Construction Company upon the hauling job at the Bethlehem Steel Corporation property, said sum of \$3,500.00 to be paid in installments of at least \$875.00 per month on or before the 4th day of each month, commencing January 4, 1941, and we do hereby authorize and request said Macco Construction Company to pay said moneys to said Young & Son Co., Ltd., a corporation, and acknowledge and agree that such payments, when so made, shall operate as a full acquittance to said Macco Construction Company of its said obligations to us to the extent of the payments made in accordance with this assignment.

In Witness Whereof we have hereunto set our hands this 3rd day of December, 1940.

A. L. FARR

R. P. SINCLAIR

We Hereby Accept the foregoing assignment and agree to make the payments at the times and in the amounts specified in said assignment. It Is Distinctly Understood and Agreed, however, that we are obligated to make said payments only out of moneys to become due and payable from us to said A. L. Farr and Robert P. Sinclair, and not otherwise, and that if sufficient moneys do not become due and payable to said A. L. Farr and Robert P. Sinclair to make said payments, we shall be obligated to make payments only to the extent of the

moneys actually due and payable from us to said A. L. Farr and Robert P. Sinclair.

In Witness Whereof the undersigned has caused these presents to be executed by its officer thereunto duly authorized.

MACCO CONSTRUCTION
COMPANY

By BEN F. WILLS

Gen. Supt. [193]

PLAINTIFFS' EXHIBIT No. 3

CONDITIONAL SALE CONTRACT

This Agreement made and entered into this 3rd day of December, 1940, by and between Young & Son Co., Ltd., a corporation, hereinafter termed seller, and A. L. Farr and Robert P. Sinclair, hereinafter termed purchasers, Witnesseth:

That the seller herein hereby agrees to sell and the purchasers herein hereby agree to purchase, subject to the terms and conditions hereof, those certain used six-cylinder Autocar Trucks bearing the following engine and serial numbers:

Engine No.	Serial No.
50616	7065368
50611	7065370
50614	7065465
501684	201897

for the sum of \$3,500.00 in lawful money of the United States, payable as follows: \$875.00, or more, on or before January 4th, 1941, and \$875.00, or more, on or before the 4th day of each month there-

after until said entire purchase price has been paid in full. Purchasers also agree to pay to seller interest upon the unpaid portions of said purchase price at the rate of 6% per annum from date hereof to the date of payment, said interest to be paid on or before four (4) months from date hereof.

It Is Distinctly Understood and Agreed that purchasers are agreeing to purchase said personal property "as is" after a personal inspection thereof by purchasers, and without any warranty, express or implied, as to the age, year model, or mechanical condition of said personal property or as to any other thing. And purchasers do hereby acknowledge and agree that no representations or warranties of any kind have been made to them regarding said personal property by seller or by anyone acting on its behalf. [194]

Purchasers agree to procure and keep in full force and effect during the life of this contract full and complete collision insurance covering said personal property, with loss, if any, payable to seller as its interests may appear and to cause to be issued and delivered to seller a certificate by the agent of the insurance company writing such insurance stating that such insurance has been secured and paid for and is in effect.

Purchasers hereby acknowledge the receipt and delivery of all of said personal property in good condition and accept the same without warranty of any kind and agree to at all times maintain the same in good condition and repair, reasonable, wear and tear thereof excepted, to properly house and protect

the same against the elements, not to take same out of the State of California without the written consent of seller and not to permit the same to be attached or not to create or permit to be created any lien, encumbrances, or adverse claims of any character against the same for storage, repairs, or otherwise, and that they will pay all taxes and assessments of every character levied or assessed against said property or this contract or the indebtedness and transaction represented thereby. Should said property suffer any loss, damage or injury, purchasers nevertheless agree to purchase and pay for said property in full according to the terms hereof.

Purchasers agree that any equipment, repairs or accessories placed upon said property shall become a component part thereof, title thereto shall be vested in seller and included under the terms of this agreement, and any indebtedness therefor, if paid by seller, shall be added to the unpaid deferred balance and become immediately due and payable with interest at the rate of 12% per annum.

Purchasers agree that they will neither use nor permit said property to be used for any unlawful purpose and that they will register, use, operate and control the same in accordance with all statutes, laws, ordinances and regulations relating to the registration, use, operation and control of motor vehicles.

Title to said property shall remain in seller until all payments herein provided for are made and all conditions hereof fully complied with, whereupon seller shall execute to purchasers a good and suffi-

cient transfer of the title to said property and endorse and deliver to purchasers the certificates of ownership issued by the Motor Vehicle Department of the State of California covering said property.

Purchasers agree that seller may at its option accept payments of principal or interest past due, or part payments of moneys due without in any manner modifying the terms of this contract and that such acceptance shall not be construed as a waiver of any subsequent defaults on the part of purchasers.

Possession of said personal property shall give the purchasers no title or interest therein and no rights thereto except as herein provided. In the event that the purchasers shall return the said property without the consent in writing of the seller, the latter may store the same to the order of purchasers and this contract shall remain in full force and effect.

Should the purchasers fail to make any of the payments herein provided for, or fail to perform any other of the terms or conditions hereof, in the manner or within the time herein specified, the seller or its assignee may, at its option, and without demand or notice of any kind to the purchasers either: (a) Declare all unpaid amounts immediately due and payable and sue therefor, or (b) Retake possession of said property and without notice resell the same at public or private sale and, after deducting all expenses and attorneys' fees incurred therein, credit the net proceeds thereof to the unpaid balance due, and said purchasers agree to pay to seller, or its assignee, any deficiency remaining under this contract

after such sale is completed and the net proceeds applied thereon, or (c) Take immediate possession of said property, wherever the same may be found, and without liability for [196] trespass, in which event all of the rights, titles and equities of the purchasers in, to or under said property and this agreement shall forthwith cease and terminate and seller shall be forthwith released from all obligations to transfer title or possession of said property to purchasers. All sums of money theretofore paid to seller hereunder shall be and remain the property of the seller, not as a penalty but as compensation for the use by purchasers of said property and for the depreciation thereof. All sums then due and unpaid under the terms hereof shall be forthwith paid to seller by purchasers as further compensation for the use by purchasers of said property.

Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently, and such action shall not operate to estop or prevent the seller from pursuing any further remedy which he may have hereunder, and any repossession or retaking or sale of the property pursuant to the terms hereof shall not operate to release the purchasers until full payment has been made in cash. Purchasers hereby waive the right to remove any legal action from the court originally acquiring jurisdiction.

Purchasers agree to pay the seller any expense incurred in recovering the possession of said property or in collecting any unpaid balance of said

purchase price, including reasonable attorneys' fees, which shall not be less than \$100.00.

Time is hereby declared to be of the essence of this agreement and of each and every term, covenant and condition thereof.

This agreement shall inure to the benefit of and shall apply to and bind the heirs, executors, administrators, successors and assigns of purchasers and the successors and assigns of seller.

It is understood and agreed that the seller or its assigns shall not be bound by any agreement or representations not contained [197] in this agreement, which the purchasers agree they have read and understand.

As further security for the payment of the purchase price of said property, purchasers agree to execute and deliver to seller, contemporaneously with the execution of this agreement, an assignment of \$3,500.00 of the moneys to become due and payable to purchasers from Macco Construction Company from the hauling job on the Bethlehem Steel Corporation property in San Francisco, California, the same to be payable at the rate of not less than \$875.00 per month. It is understood, however, that the acceptance of said assignment as further security shall not preclude or delay seller from exercising any of the other rights and options specified in this agreement in the event of default in the payment of any installment of said purchase price or the performance of any other term, covenant or condition of this agreement.

As an inducement and consideration for the execution of this contract by seller, purchasers hereby guarantee that they have secured a contract with Macco Construction Company for hauling at the property of Bethlehem Steel Corporation, San Francisco, California, upon which job the hereinbefore mentioned trucks are to be used and that said contract calls for the payment of \$4.50 per hour for each of said trucks and that the only deductions which are to be made from said truck hire by Macco Construction Company are the wages of the truck drivers and the gasoline and oil furnished to purchasers by said Macco Construction Company. And purchasers hereby agree to furnish to seller monthly a statement showing the number of hours worked by each of said trucks during the preceding month.

In Witness whereof the parties hereto have executed these [198] presents the day and year first hereinbefore written, seller by and through its President thereunto duly authorized.

YOUNG & SON CO., LTD.

By (signed) F. E. YOUNG

President

Seller

(signed) A. L. FARR

(signed) R. P. SINCLAIR

Purchasers

[Endorsed]: Filed March 5, 1942. [199]

[Title of District Court and Cause.]

VERDICT

We, the Jury, find in favor of the Plaintiff and assess the damages against the Defendant Macco Construction Co. in the sum of Twenty-Five Hundred Dollars (\$2500.00).

EDWARD A. NELSON
Foreman.

[Endorsed]: Filed March 7, 1942. [200]

[Title of District Court and Cause.]

NOTICE OF MOTIONS UNDER RULE 50(b)
FEDERAL RULES OF CIVIL PROCEDURE TO SET ASIDE VERDICT AND ANY JUDGMENT ENTERED THEREON AND TO HAVE JUDGMENT ENTERED IN ACCORDANCE WITH A MOTION FOR DIRECTED VERDICT IN FAVOR OF DEFENDANT MACCO CONSTRUCTION COMPANY AND IN THE ALTERNATIVE FOR A NEW TRIAL.

To the Plaintiff Above Named and to Philip Barnett, Their Attorneys, and to Each of Them:

You and Each of You Will Please Take Notice that the defendant Macco Construction Company, a corporation, has filed in the above entitled matter its written motions under rule 50(b) Federal Rules of Civil Procedure and to set aside verdict and any judgment entered thereon and to have judgment

entered in accordance with a motion for directed verdict in favor of defendant Macco Construction Company and in the alternative for a new trial, copies of which have heretofore been served upon you.

Each of you will please further take notice that the said motions, and each of them will come on for hearing before the above entitled court at a time and place hereinafter to [201] be designated by the above entitled court.

Dated: March 17, 1942.

SCHELL & DELAMER

By W. O. SCHELL

Attorneys for defendant,

Macco Construction Com-
pany.

(Affidavit of Service.)

[Endorsed]: Filed Mar. 18, 1942. [202]

[Title of District Court and Cause.]

ORDER DISMISSING COMPLAINT IN
INTERVENTION.

Young & Son Co., Ltd., a corporation, Intervener in the above-entitled action, through its counsel, J. W. O'Neill, this day moved the Court for an order dismissing the complaint in intervention. Defendant Macco Construction Company opposed the granting of said motion. Said motion was argued in open Court by counsel for Inter-

vener, Plaintiffs, and defendant Macco Construction Company, and submitted to the Court for decision.

It was stipulated in open Court by counsel for Intervener, and it appears to the Court and the Court [203] finds and decides that the assignment by A. L. Farr and R. P. Sinclair to Intervener, which is the basis of the claim against defendant Macco Construction Company set up in said Complaint in Intervention, did not assign to Intervener any moneys which Plaintiffs might recover from defendant Macco Construction Company by way of damages for breach of contract, but only assigned moneys which may have been actually earned by Plaintiffs and due under their contract with Macco Construction Company prior to the 18th day of January, 1941.

It appears to the Court that this Court has no jurisdiction of said Complaint in Intervention, and that it is fair, just and equitable that said motion to dismiss should be granted;

Therefore, It Is Hereby Ordered that the said Complaint in Intervention be, and the same is hereby dismissed, without prejudice, for lack of jurisdiction.

Defendant Macco Construction Company is hereby granted an exception to the foregoing order.

Dated: San Francisco, California, July 8, 1942.

JAMES ALGER FEE

United States District Judge

[Endorsed]: Filed July 8, 1942. [204]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Wednesday, the 8th day of July, in the year of our Lord one thousand nine hundred and forty-two.

Present: the Honorable James Alger Fee, District Judge.

No. 21896-S Civil

[Title of Cause.]

After hearing the arguments of Phillip Barnett, Esq., on behalf of the plaintiffs, Walter Schell, Esq., on behalf of the defendant Macco Construction Co., and J. W. O'Neill, Esq., on behalf of the intervenor, it is, as will more fully appear in orders this day signed and filed, Ordered: That the complaint in intervention of Young & Son Co., Ltd., be dismissed without prejudice for lack of jurisdiction; that this action be dismissed as to the defendants Ben F. Wells, John Doe, Richard Roe, and Black & White Co.; that the motion of the defendant Macco Construction Co. for judgment notwithstanding the verdict be denied; that the motion of the plaintiffs for the entry of judgment is granted and that judgment be entered in favor of plaintiffs for \$2500.00, together with costs; that

the motion of the defendant Macco Construction Co. for a new trial be denied and an exception allowed, and that the defendant Macco Construction Co. may have a ten-day stay of execution. [205]

In the District Court of the United States, Northern District of California, Southern Division

No. 21896-S

A. L. FARR and R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation, BEN F. WELLS, et al.

Defendants.

JUDGMENT ON VERDICT

This cause having come on regularly for trial on March 5, being a day in the March, 1942, term of said Court, before the above entitled court, and a jury of twelve persons duly impaneled and sworn to try the issues joined herein, Phillip Barnett, Esq., appearing as attorney for the plaintiffs and Schell & Delamer, Esqs. by Walter Schell, Esq., appearing as the attorneys for the defendants and the trial having been proceeded with on the 5th, 6th and 7th days of March in said year, and term, and oral and documentary evidence on behalf of the respective parties having been introduced and

closed, and the cause, after arguments by the attorneys and instructions by the court having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, namely: [206] “We, the jury find in favor of the plaintiff and assess the damages against the defendant in the sum of Twenty-five Hundred Dollars and no cents; Edward A. Nelson, foreman,” and the Court having ordered that judgment be entered herein in accordance with said verdict and for costs;

Now, Therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that said plaintiffs do have and recover of and from said defendants the sum of Twenty-five Hundred Dollars and no cents, together with his costs herein expended, taxed at \$109.25.

Dated: July 8th, 1942.

JAMES ALGER FEE

Judge.

[Endorsed]: Filed Jul. 8, 1942. [207]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To the Defendants Above Named and to Messrs.
Schell & Delamer, their attorneys:

You and Each of You Will Please Take Notice
that on Wednesday, the 8th day of July,
1942, judgment for Twenty-five Hundred Dollars
(\$2500.00) plus costs was entered in favor of the
plaintiffs and against the defendant Macco Con-
struction Company, pursuant to the Order of
Judge Fee.

Dated: June 8, 1942.

PHILLIP BARNETT

Attorney for Plaintiffs.

[Endorsed]: Filed Jul. 9, 1942. [208]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Plaintiffs, A. L. Farr and R. P. Sinclair, and
to Phillip Barnett Their Attorney; 111 Sut-
ter Street, San Francisco, California; and

To Intervener, Young & Son Co., Ltd., a Corpora-
tion, and to J. W. O'Neill Its Attorney, 1101
Central Bank Building, Oakland, California:

Notice Is Hereby Given That Macco Construc-
tion Company, a corporation, one of the defendants
herein, does hereby appeal to the United States

Circuit Court of Appeals for the Ninth Circuit
from the final Judgment entered in the within ac-
tion on the 8th day of [209] July, 1942.

Dated this 28th day of August, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Defendant and
Appellant, Macco Con-
struction Company, a Cor-
poration.

Suite 1212 Bartlett Building,
215 West Seventh Street,
Los Angeles, California.

CERTIFICATE.

I Do Hereby Certify that the copy of the fore-
going notice of appeal was mailed on the day
of, 1942, to Phillip Barnett, Esq.,
111 Sutter Street, San Francisco, California, at-
torney for plaintiffs, A. L. Farr and R. P. Sinclair,
and to J. W. O'Neill, Esq., 1101 Central Bank
Building, Oakland, California, attorney for in-
tervener, Young & Son Co., Ltd., a corporation.

WALTER B. MAILING,

Clerk of the United States
District Court.

By

Deputy Clerk

[Endorsed]: Filed Aug. 31, 1942. [210]

In the District Court of the United States, Northern District of California, Southern Division

No. 21896 S

A. F. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation, BEN F. WELLS, JOHN DOE, RICHARD ROE, BLACK AND WHITE COMPANY,

Defendants.

YOUNG & SON, CO., LTD., a corporation,

Intervener.

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States, Northern District of California, Southern Division:

You Will Please prepare a transcript of the record in this case, to be used upon appeal in the above entitled cause, embodying the following:

1. Complaint;
2. Petition for removal to Federal Court;
3. Affidavit of Ben F. Wells, in support of petition for removal;
4. Bond on removal;
5. Notice of filing petition for and of motion for [211] order of removal;
6. Order for removal;

7. Notice of filing record in United States District Court;

8. Answer of defendant, Macco Construction Company, a corporation, to plaintiffs' complaint;

9. Notice of demand for trial by jury;

10. Reporter's transcript of testimony (of which two copies have heretofore been filed with you);

11. Plaintiffs' Exhibit No. 4 and defendants' Exhibit "A";

12. Instructions to the jury requested by defendant, Macco Construction Company, and not given to the jury by the court;

13. Verdict of the jury;

14. Notice of motion under rule 50(b) of the Federal Rules of Civil Procedure to set aside verdict and any judgment entered thereon and to have judgment entered in accordance with a motion for directed verdict in favor of defendant Macco Construction Company, and in the alternative for a new trial;

15. Motion to dismiss by defendants Macco Construction Company and Ben F. Wells;

16. Order dismissing complaint in intervention of Young & Son Co., Ltd., without prejudice for lack of jurisdiction, dismissing case as to defendant, Ben F. Wells, John Doe, Richard Roe, and Black and White Company, denying motion of defendant, Macco Construction Company for judgment notwithstanding the verdict, granting motion of plaintiffs for entry of judgment, ordering judgment in favor of plaintiffs for \$2500 together with costs, denying motion of defendant Macco Con-

struction Company for new trial and granting defendant, Macco Construction Company, a ten day stay of execution;

17. Judgment of the court; [212]
18. Notice of entry of judgment;
19. Notice of appeal;
20. Designation of record on appeal;
21. Statement of the points upon which appellant intends to rely in the appeal of this case;
22. Clerk's certificate.

Dated: August 28th, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Defendant and
Appellant, Macco Construction Company.

[Endorsed]: Filed Aug. 31, 1942. [213]

[Title of Court and Cause.]

PLAINTIFFS' COUNTER AND ADDITIONAL
DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United
States, Northern District of California, Southern
Division:

In addition to the Defendants' Designation on
Appeal you will please prepare and include in said
Transcript of Record in this case the following:

1. Plaintiffs' Exhibits Numbers 1, 2, and 3.

2. Memorandum of Plaintiffs' Points and Authorities to Enter Judgment on Verdict and in Opposition to Defendants' Motion for Judgment Notwithstanding Verdict and for a New Trial.

3. Plaintiffs' Exhibit Number 4, Daily Truck Reports.

Dated: September 1, 1942.

PHILLIP BARNETT

Attorney for Plaintiffs and
Respondents.

State of California,
City and County of San Francisco—ss.

P. Babcock, being first duly sworn, deposes and says:

That she is a citizen of the United States, over 18 years of age, a resident of San Francisco City and County, and not a party to the within action; that affiant's business address is Room 1414, 111 Sutter Street, San Francisco; that affiant served a copy of the attached Plaintiffs' Counter and Additional Designation of Record on Appeal by placing said copy in an envelope addressed to Messrs. Schell [214] & Delamer, Attorneys at Law, 215 West Seventh Street, Los Angeles, California, which envelope was then sealed and postage fully prepaid thereon, and thereafter was on September 2, 1942, deposited in the United States mail at San Francisco, California; that there is delivery service by United States mail at the place so addressed, or regular communication by United States mail

between the place of mailing and the place so addressed.

P. BABCOCK

Subscribed and sworn to before me this 2nd day of September, 1942.

[Seal] VIOLET NEUENBURG

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires December 31, 1942.

[Endorsed]: Filed Sep. 3, 1942. [215]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY IN
THE APPEAL OF THIS CASE

I.

That the judgment is contrary to law in that:

1. Said judgment purports to permit recovery by the plaintiffs for damages and for alleged breach by the defendant Macco Construction Company of an alleged contract which, in fact, was not in existence at the time of the alleged breach.

2. Said judgment purports to give plaintiffs an award of damages for an alleged breach of a contract by Macco Construction Company whereas, in fact, said defendant never did breach said contract.

3. Said judgment purports to give plaintiff's

recovery [216] in damages for an alleged breach by Macco Construction Company of an alleged contract which if in fact had existed between the parties would have been void and unforceable under the applicable laws of the State of California.

4. Said judgment is contrary to the applicable laws of the State of California.

II.

That the evidence is insufficient to sustain the verdict of the jury and the judgment in this case in that the evidence establishes:

1. That whatever were the terms of the original contract prior to any alleged breach thereof by the defendant Macco Construction Company, a novation thereof took place between said parties whereby a new contract was substituted for said original contract, and said new contract was for general hauling without the specification of any definite period for such hauling.

2. That at no time during the existence of any contract between plaintiffs and defendant Macco Construction Company did the plaintiffs have the necessary equipment or maintain their trucks in such mechanical condition as to be able properly to perform the work required of them under the contract with the defendant Macco Construction Company, and said defendant was therefore justified in notifying plaintiffs that their services under such contract were terminated.

3. That whatever contract existed between plaintiffs and defendant Macco Construction Company

involved the transportation by the plaintiffs of property over the public highways of the State of California, but that plaintiffs at no time had the license or permit so to do required by the City Carriers' Act of the State of California, Act 5134 Deering's General Laws of the State of California, and that said contract was therefore void and [217] unenforceable by plaintiffs.

4. That whatever contract existed between plaintiffs and said defendant, plaintiffs, in fact, did under the terms thereof transport property over the public highways of the State of California, but that plaintiffs at no time had the license or permit so to do as required by said City Carriers' Act and that said contract was therefore void and unenforceable by plaintiffs.

5. That plaintiffs sustained no damages whatsoever by reason of the alleged breach of contract upon the part of defendants.

6. That even if plaintiffs sustained any damages by reason of the alleged breach of contract upon the part of the defendants, the amount of said recovery does not belong to plaintiffs, but has heretofore been assigned by them to intervener, Young & Son Co., Ltd., a corporation.

7. That even if plaintiffs sustained damages by reason of the alleged breach of contract upon the part of the defendants, and said amount is payable to plaintiffs, the amount thereof is much less than the amount of the verdict and judgment in this case.

III.

That the trial court permitted prejudicial error:

1. In denying the motion of defendant Macco Construction Company for a directed verdict in its favor and against the plaintiffs, in that the evidence as hereinabove specified was insufficient to show any right of recovery in plaintiffs against said defendant.

2. In denying the motion of defendant Macco Construction Company under Rule 50(b) of the Federal Rules of Civil Procedure to set aside the verdict and to have judgment entered in accordance with the motion for directed verdict of said defendant Macco Construction Company in its favor and against the plaintiffs, in that the evidence as hereinabove specified was insufficient to show any right of recovery in plaintiffs against said defendant. [218]

3. In denying the motion of the defendant Macco Construction Company for a new trial, in that the evidence as hereinabove specified was insufficient to show any right of recovery in plaintiffs against said defendant.

4. In failing to instruct the jury as requested by defendant, Macco Construction Company, that plaintiffs could not recover unless they were ready, able and willing to perform the obligations assumed by them under the contract upon which they based their right to recovery.

5. In failing to give the instruction requested by the defendant Macco Construction Company that

the laws of the State of California provided that no carrier should engage in the business of transportation of property for compensation by Motor Vehicle or truck over any public highway, road or street in any city in the State of California, without first having obtained from the Railroad Commission of the State of California a permit authorizing such operation, and further instructing the jury that if the plaintiffs in entering into or performing said contract engaged in such business without such permit, said alleged contract was illegal and void and plaintiffs could not recover in this action.

Dated: August 28th, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Defendant and
Appellant Macco Construction Company.

[Endorsed]: Filed Aug. 31, 1942. [219]

[Title of District Court and Cause.]

OBJECTIONS OF DEFENDANT AND APPELLANT MACCO CONSTRUCTION COMPANY, A CORPORATION, TO PLAINTIFFS' COUNTER AND ADDITIONAL DESIGNATION OF RECORD ON APPEAL

Comes now defendant and appellant, Macco Construction Company and files this its written objec-

tions to plaintiffs' counter and additional designation of record on appeal, to wit, said defendant and appellant objects to the inclusion in the transcript of record on appeal in this case of:

1. Any of plaintiffs' Exhibits Numbers 1, 2, 3 and 4, on the ground that said Exhibits, and each of them, are immaterial in the determination of the questions raised by appellant on this appeal.

2. The memorandum of plaintiffs' points and authorities to enter judgment on verdict and in opposition of defendants' motion for judgment notwithstanding verdict and for new trial, on the ground that said document is immaterial to any of the points involved [220] in this appeal and on the further ground that said document does not consist of any part of the records, proceedings or evidence in this case.

Dated: September 3, 1942.

SCHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for Macco Construction Company, defendant and appellant

[Endorsed]: Filed Sept. 4, 1942. [221]

In the District Court of the United States,
Northern District of California,
Southern Division

No. 21896 S

A. L. FARR, R. P. SINCLAIR,

Plaintiffs,

vs.

MACCO CONSTRUCTION COMPANY, a corporation, et al.,

Defendants.

STIPULATION CONCERNING RECORD
ON APPEAL

It Is Hereby Stipulated by and between the plaintiffs and respondents and the defendant and appellant, Macco Construction Company, a corporation:

1. That the daily truck reports comprising plaintiffs' Exhibit No. 4 in the above entitled matter were made out by the respective drivers of the respective trucks referred to therein at the end of each shift, and that they show the total number of hours worked by said trucks was six hundred ninety-five and one-half (695½) hours, with down time during said working hours of sixty-one and one-half (61½) hours, leaving a total number of net hours of six hundred thirty-four (634).

2. That in addition thereto, plaintiffs' trucks worked thirty-eight (38) hours on said job prior

to the period when said slips were put into use.
[222]

3. That on certain of said slips comments were made as to the condition of the truck and the need of repairs, but that others of said slips contained no such comments.

4. That attached hereto, as illustrative of said slips, are two slips, one containing such comments and one not containing any such comments.

5. That this stipulation, including the illustrative copies of said slips attached hereto, may and shall form a part of the record upon appeal in this case.

6. That in the record on appeal this stipulation may take the place of plaintiffs' Exhibit 4, and that said Exhibit therefore be not included in said record.

Dated: October 27th, 1942.

PHILLIP BARNETT

Attorney for plaintiffs and
respondents

SHELL & DELAMER,

By WALTER O. SHELL

Attorneys for defendant and
appellant, Macco Construc-
tion Company.

[Endorsed]: Filed Oct. 27, 1942. [223]

[Title of District Court and Cause.]

STIPULATION CONCERNING RECORD
ON APPEAL

It Is Hereby Stipulated by and between the plaintiffs and respondents and the defendant and appellant Macco Construction Company, a corporation, that the Memorandum of Plaintiffs' Points and Authorities to enter Judgment on the Verdict, and in Opposition to Defendant's Motion for Judgment Notwithstanding Verdict and for a New Trial, being Item 2 of Plaintiffs' Counter and Additional Designation of Record on Appeal, may be eliminated from the record on appeal in the above entitled matter.

It Is Further Stipulated that in the event that the use of said Memorandum is required, it may be incorporated into the [224] record by either party without further order of Court.

Dated: October 27th, 1942.

PHILLIP BARNETT,

Attorney for Plaintiffs and
Respondents.

SHELL & DELAMER,

By WALTER O. SHELL,

Attorney for defendant and
Appellant Macco Construc-
tion Co.

[Endorsed]: Filed Oct. 27, 1942. [225]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL

Upon application of the defendant and appellant, Macco Construction Company, in the above entitled matter, therefor, on reading the affidavit of W. O. Schell, Esq., filed in support thereof, and good cause therefore appearing:

It Is Hereby Ordered that defendant's time to file, in the Circuit Court of Appeals for the Ninth Circuit, the record on appeal and to cause the said action to be docketed in said Circuit Court of Appeals, is hereby extended to and including the 10th day of November, 1942.

Dated: October 2, 1942.

A. F. ST. SURE,
Judge.

[Endorsed]: Filed Oct. 3, 1942. [226]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL

Upon application of the defendant and appellant, Macco Construction Company, in the above entitled matter, therefor, on reading the affidavit of W. O. Schell, Esq., and the stipulation of the above named plaintiffs and defendant filed in support thereof, and good cause therefore appearing:

It Is Hereby Ordered that defendant's time to file, in the Circuit Court of Appeals for the Ninth Circuit, the record on appeal and to cause the said action to be docketed in said Circuit Court of Appeals, is hereby extended to and including the 24th day of November, 1942.

Dated: November 10, 1942.

(Signed) A. F. ST. SURE,
Judge.

[Endorsed]: Filed Nov. 10, 1942. [227]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 227 pages, numbered from 1 to 227, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of A. L. Farr et al., Plaintiff, vs. Macco Construction Company, a corporation, et al., No. 21896-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven Dollars and Fifty-five Cents (\$7.55) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of November A. D. 1942.

[Seal]

WALTER B. MALING,

Clerk

WM. J. CROSBY,

Deputy Clerk. [228]

[Endorsed]: No. 10312. United States Circuit Court of Appeals for the Ninth Circuit. Macco Construction Company, a corporation, Appellant, vs. A. L. Farr, R. P. Sinclair and Young & Son Co., Ltd., a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed November 23, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 21896-S

C.C.A. No. 10312

A. L. FARR, R. P. SINCLAIR,
Plaintiffs and Respondents,

vs.

MACCO CONSTRUCTION COMPANY, a cor-
poration,
Defendant and Appellant.

STATEMENT OF POINTS AND
DESIGNATION OF RECORD

Appellant, Macco Construction Company, a corporation, does hereby formally adopt the statement of points upon which appellant intends to rely in the appeal of this case filed by it in the above entitled case with the Clerk of the United States District Court, Northern District of California, Southern Division, as appellant's statement of points upon this appeal.

Appellant, Macco Construction Company, a corporation, does hereby designate as necessary for the consideration of appellant's points upon this appeal the entire record in the above case as certified to the Circuit Court of Appeals for the Ninth Circuit by said District Court.

Dated: October 1, 1942.

SHELL & DELAMER

By GERALD F. H. DELAMER

Attorneys for defendant and
appellant, Macco Construc-
tion Company.

[Endorsed]: Filed Nov. 23, 1942.